TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 896.

MENASHA PAPER COMPANY, PLAINTIFF IN ERROR,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

FILED NOVEMBER 8, 1915.

(24,979)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 15, 1916.

1 Supreme Court of Wisconsin.

No. 123.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Plaintiff,
vs.
MENASHA PAPER COMPANY, Defendant.

Filed Sep. 22, 1915. John H. Laabs, Clerk.

Petition for Writ of Error.

Considering itself aggrieved by the final decision of the Supreme Court in rendering judgment against it in the above entitled cause, the defendant hereby prays a writ of error from the said decision and judgment to the Supreme Court of the United States. Assignment of errors herewith.

FELIX J. STREYCKMANS,
Attorney for Defendant.

STATE OF WISCONSIN,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by the Menasha Paper Company to the Chicago & Northwestern Railway Company, in the sum of Thirty-seven Hundred Dollars; said bond when approved to act as a supersedeas.

Dated Sept. 14, 1915.

JNO. B. WINSLOW,
Chief Justice of the Supreme Court of Wis.

2 Supreme Court of Wisconsin.

No. 123.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Plaintiff,
vs.
MENASHA PAPER COMPANY, Defendant.

Filed Sep. 22, 1915. John H. Laabs, Clerk.

Assignment of Errors.

Now comes the above defendant and files herewith its petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignment:

1. The Supreme Court of Wisconsin erred in holding and de-

ciding that there were any demurrage charges due for the reason that under the provisions of the Act of Congress commonly called the "Act to Regulate Commerce" and amendments thereto, no such demurrage charges can be charged and collected unless tariffs on file with the Interstate Commerce Commission provide for such charges.

2. The tariffs filed for complainant with the Interstate Commerce Commission at the time *of* the shipments in question moved did not authorize the charging and collection of demurrage charges on the cars named in the complaint.

3. The Supreme Court of Wisconsin erred in holding and deciding that the so-called embargo was in violation of the so-called Hepburn Act of June 29, 1906, 34 Stats. 584, C. 3591.

For which errors the defendant Menasha Paper Company
3 prays that the judgment of the said Supreme Court of Wisconsin dated —— —, 191-, be reversed, and a judgment entered for the defendant Menasha Paper Company and for costs.

FELIX J. STREYCKMANS,
Attorney for Menasha Paper Company.

4 Filed Sep. 22, 1915. John H. Laabs, Clerk.

Copy.

Supreme Court of the United States.

No. 123.

MENASHA PAPER COMPANY, Plaintiff in Error,
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant in Error.

Bond.

Know all men by these presents, that we, Menasha Paper Company, as principal, and M. H. Ballou and N. J. Smith as sureties, are held and firmly bound unto the Chicago & Northwestern Railway Company, in the sum of Thirty-seven Hundred Dollars ($3700.00) to be paid to the said Chicago & Northwestern Railway Company, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated this 9th day of July, A. D. 1915.

Whereas, the above named plaintiff in error seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Wisconsin,

Now, therefore, the condition of this obligation is such, that if the above named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if

it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

[SEAL.] MENASHA PAPER COMPANY,
By HARRY BALLOU, *Its Treasurer.*
M. H. BALLOU,
N. J. SMITH.

5 Copy.

STATE OF WISCONSIN,
County of ——, *ss:*

M. H. Ballou and N. J. Smith, being each duly sworn, on oath depose and say: We are each of lawful age and are citizens of the State of Wisconsin, and know the contents of the foregoing instrument to which we have attached our names. We each for himself say we are worth the sum of Thirty-seven Hundred Dollars ($3700.00) over and above all debts, liabilities and exemptions.

M. H. BALLOU.
N. J. SMITH.

Subscribed and sworn to before me this 9th day of July, A. D. 1915.

[NOTARIAL SEAL.] R. M. SENSENBRENNER,
Notary Public.

My Commission expires April 1, 1917.

The above bond is approved.
JNO. B. WINSLOW,
Chief Justice of the State of Wisconsin.

We approve of the foregoing bond July 22, 1915.
LINES, SPOONER, ELLIS & QUARLES,
Attorneys for Defendant in Error.

6 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Supreme Court of the State of Wisconsin and the Circuit Court of Winnebago County:

Because, in the records and proceedings, as also the rendition of a judgment in a plea which is in the said Supreme Court of Wisconsin, before you, at the December sitting of the August Term, 1914, thereof, between the Chicago & Northwestern Railway Company versus Menasha Paper Company, a corporation, defendant, a manifest error has happened, to the great damage of the said defendant Paper Company as by its complaint appears.

We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the

United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid, at the City of Washington, D. C., and filed in the office of the Clerk of the United States Supreme Court on or before thirty days from the date hereof, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 14th day of September, A. D. 1915.

Done in the City of Madison, with the seal of the District
7 Court of the United States for the Western District of Wisconsin attached.

[Seal U. S. District Court, Western Dist. of Wisconsin, Madison.]

F. W. OAKLEY,
Clerk District Court of the United States,
Western District of Wisconsin,
By FRED W. FRENCH, *Deputy.*

Allowed:
JNO. B. WINSLOW,
Chief Justice of the Supreme Court
of the State of Wisconsin.

Filed Sep. 22, 1915. John H. Laabs, Clerk.

8 Filed Sep. 22, 1915. John H. Laabs, Clerk.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Chicago & Northwestern Railway Company, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Wisconsin, wherein Menasha Paper Company, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Wisconsin, this 14th day of September A. D. 1915.

JNO. B. WINSLOW,
Chief Justice of the Supreme Court
of the State of Wisconsin.

Attest:
CLARENCE KELLOGG,
Clerk of the Supreme Court
of the State of Wisconsin.

I, attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

LOUIS QUARLES,
Attorney for the Chicago & Northwestern Railway Company.

Filed Sept. 22, 1915. John H. Laabs, Clerk.

In the Supreme Court of Wisconsin.

No. 123.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Plaintiff and Respondent,
vs.
MENASHA PAPER COMPANY, Defendant and Appellant.

It is stipulated by and between the parties to the above entitled cause, by their respective counsel, that the printed case filed in this Court may be substituted in lieu of a transcript of the record of the Circuit Court, with the following additions:

Defendant's Exhibit 47, referred to on page 85 of said Printed Case, shall be attached to and made a part of said Transcript together with this stipulation.

It is further stipulated and agreed that the schedule attached to the complaint and which schedule was not printed in the printed case, shows that the contents of the cars in question consisted of the following:

First cause of action (intrastate demurrage) logs—Nothing; bolts—$34.00.

Second cause of action (interstate demurrage) logs—$553.00; bolts—$431.00.

July 22d, 1915.

LINES, SPOONER, ELLIS & QUARLES,
Attorneys for Chicago & Northwestern Railway Company.
FELIX J. STREYCKMANS,
Attorneys for Menasha Paper Company.

[Endorsed:] In the Supreme Court of Wisconsin. Chicago & Northwestern Railway Company, Plaintiff and Respondent, vs. Menasha Paper Company, Defendant and Appellant. Stipulation regarding record. Original. Lines, Spooner, Ellis & Quarles, Pabst Bldg., Milwaukee, Wis.

12 Filed Sep. 22, 1915. John H. Laabs, Clerk.

STATE OF WISCONSIN:

In Supreme Court August Term, 1914.

No. 123.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Plaintiff and Respondent,
vs.
MENASHA PAPER COMPANY, Defendant and Appellant.

Case.

Appeal from a judgment in favor of plaintiff and against the defendant for $1,424.23, damages and costs rendered and entered on the 22d of May, 1914, in the Circuit Court of Winnebago County. Hon. George W. Burnell, Circuit Judge presiding.

1. Summons, served January 31, 1912.
2. Proof of service.

13 *Complaint.*

(Title of Cause.)

Now comes the plaintiff above named by Lines, Spooner, Ellis & Quarles, its attorneys, and for complaint against the defendant herein, alleges and shows to the court:

1. That at all of the times hereinafter mentioned the plaintiff was, and still is, a railroad corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, and during all of said times was, and is, doing an intrastate and interstate business as a common carrier of passengers and freight to and from places in said state, and that during all of said times, it owned and operated a system of railroads running between the stations mentioned and described in this cause of action.

2. That during all of the times hereinafter mention-, the defendant was, and still is, a corporation, organized, existing and doing business under and by virtue of the laws of the State of Wisconsin.

3. That the plaintiff complied with chapter 362, laws of 1905, published June 15, 1905, and all amendments thereof, which act is known as "An Act to Regulate Railroads and other Common Carriers," and was in all respects complying therewith at all the times mentioned in this cause of action, and that among other things and pursuant to said chapter, it caused to be prepared and printed and filed with the Railroad Commission of Wisconsin, schedules showing all its rates, fares and charges for intrastate transportation of
14 property, including its schedules for computing demurrage charges, as required by said chapter, and that it at all times

kept the said schedule open to public inspection as required by said chapter, and that a copy of said demurrage schedules is attached to this complaint, marked "Exhibit A," and made a part hereof.

4. That long prior to the times mentioned in this cause of action, a custom respecting freight in carloads had become established on all lines of railroad in Wisconsin; that under that custom it was the duty of the shipper to load the car and it was the duty of the consignee or owner of the freight to unload the car.

5. That according to said custom and said schedules, it was, at all times mentioned in this cause of action, the duty of the consignor of freight in carloads to load the same into cars and it was the duty of the consignee or owner to unload the cars containing said freight.

6. That between the 3d day of June, 1908, and the 20th day of July, 1908, plaintiff, as the last carrier, carried and delivered in intrastate commerce, certain freight, in carloads, and defendant detained the cars containing said freight and prevented the plaintiff's use thereof in its business as a common carrier, for such length of time that demurrage charges accrued thereon, under said schedules,
15 and that the number of each car detained, its initial or initials, the contents thereof, the number of days it was detained, and the demurrage charges for such detention under said schedules is stated and set forth in "Exhibit B," attached to this complaint and made a part of this cause of action.

That the first column of said exhibit shows the number of the car; the second column the initial of the road owning said car; that "C" stands for the plaintiff company and "O" stands for the Chicago, St. Paul, Minneapolis & Omaha Railway Company; that the fifth, sixth, seventh, eighth and ninth columns give respectively the date of the way bill, of the arrival of the car at destination, date ordered placed for unloading at destination by defendant, date actually placed for unloading at destination by plaintiff, and date unloaded by defendant and released to said plaintiff after said unloading; that in said columns the first figure denotes the month of the year, the second figure the day of the month, and the third the hour of the day—all of said third figures, from seven to twelve, both inclusive, denoting hours A. M., and one to six, both inclusive, denoting hours P. M.; that the tenth, eleventh and twelfth columns show respectively the amount of demurrage charged, the amount of demurrage actually due, and the amount of demurrage cancelled; that the thirteenth, fourteenth, fifteenth, sixteenth and seventeenth columns show respectively the number of days allowed for each of the following reasons, to-wit: Weather interference, bunching, inadvertent overcharge, railroad error and omission because of new loads being set in ahead of old loads
16 and miscellaneous corrections, said last mentioned being either correction in the date of release or correction in date of arrival, due to cars being held short of destination.

6½. That said demurrage charges accrued at destination because of the congestion of the private side-tracks of defendant and the inability of plaintiff to make delivery thereon because of such congestion, and that each and every of said cars was duly tendered

said defendant at destination; that said tender was refused by said defendant and said cars were held at the nearest available point to defendant's private track by the orders of defendant from the time of their arrival until the time ordered placed for unloading by said defendant and thereafter were placed for unloading as fast as the said private side-track would accommodate.

7. That the freight in each of such cars was intrastate freight, was shipped under said schedules so as aforesaid filed and kept open to public inspection, was loaded into said cars by the consignors thereof, and it was their duty to load said cars, and it was the duty of the defendant as owner and consignee of the freight in each of said cars to unload the same under said schedules.

8. That the defendant has not at any time, upon any ground, complained to the Railroad Commission of Wisconsin in respect to said demurrage charges, or any of them, nor in respect to said demurrage schedules, or any of them, and that more than six months has expired since the delivery of said shipments at destination, and that prior to the commencement of this action the plaintiff
17 demanded of the defendant payment of each of said charges and the defendant refused payment thereof; that there is now due and owing the plaintiff from the defendant the sum of thirty-four dollars ($34.00), together with interest thereon from the 20th day of July, 1908, at six per cent per annum.

Wherefore, plaintiff demands judgment against defendant on this cause of action in the sum of thirty-four dollars ($34.00), together with interest thereon from the 20th day of July, 1908, at six per cent per annum, together with the costs and disbursements of this action.

The plaintiff as and for a second and separate cause of action against the defendant alleges:

1. That at all of the times hereinafter mentioned the plaintiff was, and still is, a railroad corporation duly organized and existing under and by virtue of the laws of the state of Wisconsin, and during all of said times owned and operated a system of connected railroads in and between Wisconsin, Michigan, and other states, and was a common interstate carrier by said railroads between said states, and when tendered to it by other common carriers by railroad in each of said states, it received, as required by the act of Congress entitled "An Act to Regulate Commerce," passed February 4, 1887, and the amendments thereof, loaded cars for transportation of the cars and loads to Menasha, Wisconsin.

2. That during all of the times hereinafter mentioned the defendant was, and still is, a corporation organized, existing
18 and doing business under and by virtue of the laws of the state of Wisconsin.

3. That the plaintiff, in August, 1886, became a member of a voluntary unincorporated association known as the American Railway Association and ever since said date has been such member; that such association adopted rules governing the interchange of cars among all companies belonging to the association and for the return thereof to the company owning the same, and fixing the

compensation to be paid for the use thereof; that the said rules were made for the purpose of continuous transportation beyond the line of the initial carrier and for the purpose of promptly supplying shippers with cars; that the car not its own mentioned in this cause of action belonged at the times mentioned in this cause of action to one of the members of said association, and for the use of said car not its own it paid to the owner thereof a reasonable compensation fixed by said association, and has a good right and title to all demurrage charges accruing on said car.

4. That the plaintiff complied with the act of Congress entitled "An Act to Regulate Commerce," passed February 4, 1887, and all amendments thereof and supplements thereto, and was in all respects complying therewith at all the times mentioned in this cause of action, and that among other things and pursuant to said Acts of Congress, it caused to be prepared and printed and filed with the Interstate Commerce Commission at Washington, D. C., schedules showing all its rates, fares and charges for interstate transportation of property, including its schedules for computing
19 demurrage charges, as required by said acts of Congress, and that it at all times kept the said schedules open to public inspection as required by said acts of Congress, and that a copy of said demurrage schedules is attached to this complaint marked "Exhibit A," and made a part of this cause of action.

5. That long prior to the times mentioned in this cause of action a custom respecting freight in carloads had become established on all interstate lines of railroad running into Wisconsin; that under said custom it was the duty of the shipper to load the car and it was the duty of the consignee or owner of the freight to unload the car.

6. That according to said custom and said schedules it was at all the times mentioned in this cause of action the duty of the consignor of freight in carloads to load the same into cars, and it was the duty of the consignee or owner to unload the cars containing said freight.

7. That between the 3rd day of June, 1908, and the 20th day of July, 1908, both dates included, plaintiff, as the last carrier, carried and delivered in interstate commerce certain freight in carloads, and the defendant detained the cars containing said freight at point of destination and prevented the plaintiff's use thereof in its business as a common carrier for such length of time that demurrage charges accrued thereon under said schedules, and that the number of each car detained, its initial or initials, the contents thereof, the number of days it was detained, and
20 the demurrage charges for such detention under said schedules is stated and set forth in "Exhibit C" attached to this cause and made a part thereof.

That the first column of said exhibit shows the number of car; the second column the initial of the road owning said car; that "C" stands for the plaintiff company and "O" stands for the Chicago, St. Paul, Minneapolis & Omaha Railway Company; that the fifth, sixth, seventh, eighth and ninth columns give respectively the date

of the way bill, of the arrival of the car at destination, date ordered placed for unloading at destination by defendant, date actually placed for unloading at destination by plaintiff, and date unloaded by defendant and released to said plaintiff after said unloading; that in said columns the first figure denotes the month of the year, the second figure the day of the month, and the third figure the hour of the day—all of said third figures, from seven to twelve, both inclusive, denoting hours A. M., and one to six, both inclusive, denoting hours P. M.; that the tenth, eleventh and twelfth columns show respectively the amount of demurrage charged, the amount of demurrage actually due, and the amount of demurrage cancelled; that the thirteenth, fourteenth, fifteenth, sixteenth and seventeenth columns show respectively the number of days allowed for each of the following reasons, to-wit: Weather interference, bunching, inadvertent overcharges, railroad error and omission because of new loads being set in ahead of old loads, and miscellaneous corrections,
said last mentioned being either correction in the date of
21 release or correction in date of arrival, due to cars being held
short of destination.

7½. That said demurrage charges accrued at destination because of the congestion of the private side-tracks of defendant and the inability of plaintiff to make delivery thereon because of such congestion, and that each and every of said cars was duly tendered said defendant at destination; that said tender was refused by said defendant and said cars were held at the nearest available point to defendant's private track by the orders of defendant from the time of their arrival until the time ordered placed for unloading by said defendant, and thereafter were placed for unloading as fast as the said private side-track would accommodate.

8. That the freight in each of such cars was interstate freight, was shipped under said schedule so as aforesaid filed and kept open to public inspection, was loaded into said cars by the consignors thereof, and it was their duty to load said cars, and it was the duty of the defendant as owner and consignee of the freight in each of said cars to unload the same under said schedules, and in all cases where said schedules so required, due notice as required by said schedules was duly given to the defendant.

9. That the defendant has not at any time, upon any ground, complained to the Interstate Commerce Commission in respect to said demurrage schedules, or any of them, and that more than two
years has expired since the delivery of said shipments at
22 destination, and that prior to the commencement of this action plaintiff demanded payment of each of said charges and defendant refused payment thereof, and that there is now due and owing to the plaintiff from the defendant the sum of nine hundred eighty-four dollars ($984.00), together with interest thereon from the 20th day of July, 1908, at six per cent per annum.

Wherefore, Plaintiff demands judgment against defendant on this cause of action in the sum of nine hundred eighty-four dollars ($984.00), together with interest thereon from the 20th day of July,

1908, at six per cent per annum, together with the costs and disbursements of this action.

LINES, SPOONER, ELLIS & QUARLES,
Plaintiff's Attorneys.

(Verification.)

EXHIBIT A.

Wisconsin Car Service Association.

Rules and Instructions to Agents.

Rule 1.

Cars Subject to Rules.

All carload freight, all freight taking carload rate, and all freight in cars, whether full carload or not, taking track delivery will be subject to Car Service and Trackage Rules.

Exceptions: Cars loaded with live stock, through consignments when not held for orders, private cars detained on the tracks of the owner of such cars, and Company material are not subject to
23 Car Service Rules and shall not be included in reports to the Manager.

Rule 2.

Free Time Allowed.

Section A. On all commodities for loading or unloading forty-eight (48) hours' (two (2) days) free time will be allowed.

Section B. When same car is reloaded ninety-six (96) consecutive hours, four (4) consecutive days will be allowed for unloading and reloading.

Section C. On all grain subject to State or Board of Trade Inspection, received on or before 8 A. M., disposition shall be given by 6 P. M. of same day, provided inspection has been made.

Section D. Small railroads (belt, electric, tram, logging, etc.), not members of the Car Service Association, handling cars for themselves, or other parties, shall be charged with all cars delivered them from the time placed upon interchange track until returned thereto, a reasonable time being allowed to perform the switching service in addition to forty-eight (48) hours for loading and unloading.

Note.—In calculating time, Sundays and Legal Holidays are excepted.

Rule 3.

Computing Time.

Section A. On cars for loading or unloading the free time shall be computed from the first 7:00 o'clock A. M. or 12:00
24 o'clock noon following the notice of arrival or after placing.

Section B. Notification of arrival of freight shall be served

immediately upon arrival by personal act, or deposited in the United States postoffice, or other means mutually agreed upon between agents and consignees. If by mail, notice shall date from time of deposit in the United States mail.

Rule 4.

Cars Held for Various Purposes.

Cars which are stopped in transit or held by orders of shippers or consignees for reconsignment to points beyond, for change of load, for amended instructions, for change in billing, milling, shelling, cleaning, etc., or on account of improper, unsafe or excessive loading, or for any other reason for which the shipper or consignee is responsible, shall be subject to Car Service charges after the expiration of forty-eight (48) hours from arrival at the point of stoppage, and all Car Service must be collected, or billed as advances when cars go forward.

Rule 5.

Placing Cars for Delivery and for Loading.

Section A. Cars containing freight to be delivered on carload delivery track or private sidings shall be placed on the track designated as soon as the ordinary routine of yard work will permit. When delivery cannot be made on account of such track being fully occupied, or for any other reason beyond control of the carrier, delivery shall be made at the nearest available point.

Section B. Cars for unloading shall be considered placed when such cars are held awaiting orders from consignors or consignees, or for the payment of freight charges after the notice mailed or otherwise given, or for the surrender of bills of lading.

Section C. The delivery of cars to private tracks shall be considered to have been made, either when such cars have been placed on the tracks designated, or, if such track or tracks be full, when the road offering the cars would have made delivery had the condition of such tracks permitted.

Section D. On private cars detained on the tracks of the Railroad Company, or on private tracks of firms other than the owner of the car, the regular charge will be made.

Section E. Cars must not be held back from nor out of the place to which they are consigned for the purpose of evading Car Service and Trackage charges. When cars are held by reason of consignee not being ready to receive them, the agent shall include such cars in his reports to the Manager, and Car Service and Trackage will be charged for as provided in these rules.

Section F. Cars for loading shall be considered placed when such cars are placed on shipper's orders or when held upon orders of shippers.

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Rule 6.

Freight in Bond.

On cars containing freight in bond, when placed for unloading, Car Service and Trackage will commence forty-eight (48) hours after cars have been released by United States Customs Inspector, providing consignee or consignor gives immediate notice to the proper Customs Inspector. When such notice is not given at once, the delay between the arrival and time of such notice will be added to the time consumed in the unloading, and the regular charge applied.

Rule 7.

Inability to Receive Cars.

When any consignee is unable to receive cars, and for that reason delivering line refuses them from connecting line for switching, when consigned to such consignee, the agent of such connecting line or lines holding cars for such consignee shall immediately notify the consignor or consignee in writing of cars so held and of the inability to forward or deliver the same, and shall charge Car Service and Trackage after forty-eight (48) hours from such notice. Copy of such notice must be sent to the Manager.

Rule 8.

Charges.

At the expiration of the free time allowed, if cars are not loaded or unloaded, a minimum charge of One Dollar ($1.00) per
27 car per day or fraction of a day shall be made.

Rule 9.

Collections.

Section A. It is the duty of the agent to demand Car Service and Trackage on all cars before delivering them when same has accrued between the arrival and ordering. It is also the duty of the agent, where he has any doubt about Car Service and Trackage being paid, to demand Car Service and Trackage daily after the free time allowed for loading and unloading cars; if payment of said Car Service is refused, to decline to deliver the car or to allow the lading to be taken from it, either by sealing the car, locking the car, or by placing it where it is not accessible to consignee or consignor; or, at his option, may send such freight to a public warehouse where same will be held subject to Car Service and Trackage charges accrued, in addition to all other charges.

Section B. When cars are detained on private or specially designated tracks for loading or unloading beyond time allowed in accord-

ance with the rules, and payment of Car Service charges is refused or unnecessarily deferred, Agents will, upon advice to that effect from the Manager, after giving five days' notice, decline to switch cars to private or specially designated tracks for such parties, and thereafter tender freight from public team tracks and collect all charges before delivery, or until satisfactory guarantee is given
28 that Car Service rules will be complied with.

Section C. When freight is detained at shipping point by shipper or consignee, or stopped in transit for them, or ordered from one destination to another, and Car Service and Trackage charges cannot otherwise be collected before forwarding Agents must enter amounts on bills of lading or shipping receipts and way-bills as advanced charges.

Section D. Agents will collect Car Service charges regardless of the state of weather, unless exemption is authorized by the Manager.

Section E. When freight is transferred, Car Service and Trackage charges will continue on the car or cars into which transfer is made.

Section F. Car Service charges due upon cars ordered to tracks of connecting lines within switching limits will be collected by the agent of the forwarding road. When ordered or destined to points beyond switching limit, the charges will follow as advances unless paid by shipper or consignee.

Section G. Where a car is detained on one road waiting orders from consignee or consignor, and subsequently ordered to connecting line for delivery within switching limits, the transfer slip or shipping order will accompany the car and show the number of hours such car has been detained awaiting orders.

For each day or fraction of a day a car is detained over forty-eight (48) hours, the receiving Agent will collect One Dollar
29 ($1.00) and deduct twenty-four (24) hours for each dollar collected from the total time car is detained, showing the remainder of hours detained on the transfer slip.

The delivering agent will allow forty-eight (48) hours' free time, less the number of hours shown on transfer slip

Rule 10.

Authority.

Agents shall report to and receive instructions from the Manager in all matters pertaining to the enforcement of Car Service and Trackage Rules.

Rule 11.

Claims.

All claims arising from operation hereunder must be presented to the Manager with the paid Car Service expense bills and a written statement clearly giving their reasons for such claims.

Rule 12.

Complaints.

All doubtful questions as to the meaning and application of these rules shall be referred to the Manager for his decision.

JAS. O. KLAPP, *Manager.*

Answer.

(Title of Cause.)

Now comes the defendant, The Menasha Paper Company, by Silas Bullard and Felix J. Streyckmans, its attorneys, and
30 for answer to the complaint alleges that as to the first cause of action therein set forth:

1. That the plaintiff was and is a railroad corporation as stated.

2. That the defendant is a corporation as herein stated.

3. Whether or not plaintiff complied with Chapter 362, Laws of 1905, published June 15, 1905, and all amendments thereof as set forth in Paragraph 3 of said complaint, this defendant has not sufficient knowledge nor information to form a belief.

4. That the facts alleged in Paragraphs 4 and 5 of said complaint are true.

5. That, as to the facts alleged in Paragraph 6 of said complaint, this defendant did not detain cars containing freight and did not prevent the plaintiff's use thereof for such length of time that demurrage charges accrued thereon under the schedule referred to therein.

As to Exhibit "B," this defendant alleges that, during the period of time referred to in said Exhibit, it received a large number of cars loaded with Logs and Bolts, but as to whether or not said Exhibit correctly shows the matters and things stated in said complaint and Exhibit, this defendant has not sufficient knowledge nor information upon which to form a belief. But this defendant alleges that it was the duty of plaintiff to place all cars for unloading at destination immediately on their arrival at destination without orders
31 from this defendant, and that this defendant did not give plaintiff orders to hold said cars at destination and did not order said cars placed for unloading at destination. That said Exhibit does not correctly show the amount of demurrage actually due, for the reason that there was no demurrage due.

6. As to the statements in Paragraph 6½ of said complaint, defendant avers that the same are not true in form and in substance.

7. This defendant denies that there is now due and owing the plaintiff the sum of $34 or any other sum.

8. This defendant further avers that it does not own a private track at Menasha, the point of destination alleged in said complaint, but that there is a side-track adjacent to the mill of this defendant at said Manasha which is owned and operated by said plaintiff Railroad Company, as part of its line of railroad and used by said rail-

road for the delivery of carload freight to this defendant and other persons or corporations in said City of Menasha.

9. Defendant further avers that on all carloads of freight destined to Menasha, it was the duty of plaintiff to tender the same to this defendant on said side-track in said City of Menasha within a reasonable time after their arrival at Menasha, but that in a great many instances during the period of time referred to in said complaint, this plaintiff failed to so tender and deliver said cars to this defendant.

32 10. Defendant further avers that on or about the period of time referred to in said complaint or just prior thereto, plaintiff had placed an embargo on all Bolts and Logs destined to this defendant at Menasha. That said embargo was raised without notice to this defendant and that immediately succeeding the third day of June, A. D. 1908, plaintiff transported a large quantity of cars of freight to this defendant at Menasha without notifying this defendant that said embargo had been raised. That the plaintiff failed to furnish at said City of Menasha proper and sufficient terminal facilities to take care of the large amount of freight destined to this defendant at said City of Menasha. That said carloads of freight, referred to in said complaint, were not tendered to this defendant at Menasha and refused by this defendant and this defendant did not order plaintiff to hold the said cars at the nearest available point to destination and did not order said cars placed on the side-track located adjacent to the defendant's mill.

11. Defendant further avers that it, the defendant, accepted all cars tendered to it at Menasha and unloaded the same within the free time provided for in the Car Service Rules referred to in said complaint, and was ready and willing and able to unload a larger number of cars on each of the days referred to in said complaint, but that the plaintiff, either through its refusal or inability to do so, failed to place said cars of Bolts or Logs at such points or places in the City of Menasha as would enable this defendant to unload the same.

33 12. Defendant further avers that, by reason of plaintiff not having sufficient terminal facilities, it, the plaintiff, failed to tender or deliver to this defendant the cars referred to in said complaint, but on the contrary held said cars at points in and about Menasha where this defendant could not secure access to the same for the purpose of unloading.

As to the second cause of action in said complaint alleged, this defendant avers:

1. That the plaintiff was and is a railroad corporation as stated.

2. That the defendant is a corporation as herein stated.

3. As to matters and things stated in paragraphs 3 and 4 of said complaint, this defendant has not sufficient knowledge or information to form a belief.

4. That the facts alleged in Paragraphs 5 and 6 of said complaint are true.

5. That, as to the facts alleged in Paragraph 7 of said complaint, this defendant did not detain cars containing freight and did not

prevent the plaintiff's use thereof for such length of time that demurrage charges accrued thereon under the schedule referred to therein.

As to Exhibit "C," this defendant alleges that, during the period of time referred to in said Exhibit, it received a large number of cars loaded with Logs and Bolts, but as to whether or not said Exhibit correctly shows the matters and things stated in said complaint and Exhibit, this defendant has not sufficient knowledge nor in-
34 formation upon which to form a belief. But this defendant alleges that it was the duty of plaintiff to place all cars for unloading at destination immediately on their arrival at destination, without orders from this defendant, and that this defendant did not give plaintiff orders to hold said cars at destination and did not order said cars placed for unloading at destination. That said Exhibit does not correctly show the amount of demurrage actually due, for the reason that there was no demurrage due.

6. As to the statements in Paragraph 7½ of said complaint, defendant avers that the same are not true in form and in substance.

6½. As to Paragraph 8 of said second cause of action, defendant denies that due notice as required by said schedules was duly given to the defendant.

7. This defendant denies that there is now due and owing the plaintiff the sum of $984, or any other sum.

8. This defendant further avers that it does not own a private track at Menasha, the point of destination alleged in said complaint, but that there is a side-track adjacent to the mill of this defendant at said Menasha which is owned and operated by said plaintiff Railroad Company, as part of its line of railroad, and used by said railroad for the delivery of carload freight to this defendant and other persons or corporations in said City of Menasha.

35 9. Defendant further avers that on all carloads of freight destined to Menasha, it was the duty of plaintiff to tender the same to this defendant on said side-track in said City of Menasha within a reasonable time after their arrival at Menasha, but that in a great many instances during the period of time referred to in said complaint, this plaintiff failed to so tender and deliver said cars to this defendant.

10. Plaintiff further avers that on or about the period of time referred to in said complaint, or just prior thereto, plaintiff had placed an embargo on all Bolts and Logs destined to this defendant at Menasha. That said embargo was raised without notice to this defendant and that immediately succeeding the third day of June, A. D. 1908, plaintiff transported a large quantity of cars of freight to this defendant at Menasha without notifying this defendant that said embargo had been raised. That the plaintiff failed to furnish at said City of Menasha proper and sufficient terminal facilities to take care of the large amount of freight destined to this defendant at said City of Menasha. That said carloads of freight, referred to in said complaint, were not tendered to this defendant at Menasha and refused by this defendant, and this defendant did not order plaintiff to hold the said cars at the nearest available point to destination and did not

order said cars placed on the side-track located adjacent to the defendant's mill.

11. Defendant further avers that it, the defendant, ac-
36 cepted all cars tendered to it at Menasha and unloaded the same within the free time provided for in the Car Service Rules referred to in said complaint, and was ready and willing and able to unload a large number of cars on each of the days referred to in said complaint, but that the plaintiff, either through its refusal or inability to do so, failed to place said cars of Bolts or Logs at such points or places in the City of Menasha as would enable this defendant to unload the same.

12. Defendant further avers that, by reason of plaintiff not having sufficient terminal facilities, it, the plaintiff, failed to tender or deliver to this defendant the cars referred to in said complaint, but on the contrary held said cars at points in and about Menasha, where this defendant could not secure access to the same for the purpose of unloading.

Wherefore, This defendant prays judgment dismissing the complaint of the plaintiff upon the merits and for its costs herein incurred.

SILAS BULLARD,
Menasha, Wisconsin.
FELIX J. STREYCKMANS,
Defendant's Attorney, 167 *Washington St., Chicago, Ill.*

(Verification.)
Order of Reference.
Stipulation for Reference.

37 *Findings of Referee.*

(Title of Cause.)

This action was referred to the undersigned as Referee by order of this Court, dated May 2, 1912, to hear, try and determine the whole issues in this cause.

I, John F. Harper, Referee so appointed, do respectfully report that after issuing and serving notice of hearing, the parties to said matter appeared at my office in the City of Milwaukee, on the 2nd day of September, 1913, and the proceedings then and thereafter had in this matter are set forth in the record of such proceedings, filed herewith.

Upon testimony taken and other proceedings had, and after hearing arguments of counsel, I respectfully report the following findings of fact and conclusions of law:

Findings of Fact.

I. That the plaintiff was, at all times mentioned in the complaint, a railroad corporation, engaged in operating a railroad at Menasha, Wisconsin, and elsewhere, and that the defendant was at such times,

also a corporation engaged in business at Menasha, Wisconsin, and having its place of business adjoining the railroad of the plaintiff.

2. That the defendant during the times in question, maintained and operated for the purposes of unloading the cars delivered by the plaintiff, a private sidetrack, which connected with the tracks of the plaintiff.

38 3. That on and between the 3rd day of June, 1908, and the 20th day of July, 1908, the plaintiff carried and delivered in intrastate commerce certain cars, containing pulp and wooden bolts and logs, as more particularly set forth in Exhibit B attached to the complaint; that the numbers of said cars, the dates and hours of their arrivals at Menasha, Wisconsin, the dates and hours when the same were ordered by the defendant placed upon its side-track, the dates and hours when they were respectively placed upon its side-track for unloading, and the dates and hours when they were respectively released, are all correctly set forth in Exhibit B, attached to the complaint.

4. That on and between the 6th day of June and the 24th day of June, 1912, the plaintiff carried and delivered in interstate commerce certain cars, containing logs and wooden bolts, as more particularly set forth in Exhibit C, attached to complaint; that the numbers of said cars, the dates and hours of their arrivals at Menasha, Wisconsin, the dates and hours when the same were ordered by the defendant placed upon its side-track, the dates and hours when they were respectively placed upon its side-track for unloading and the dates and hours when they were respectively released, are all correctly set forth in Exhibit C, attached to the complaint.

5. That the defendant's side-track, from which the cars were unloaded by the defendant, could accommodate about seven cars, but had an actual capacity, as used during the times in question,

39 of three or four cars, or possibly five; that as defendant used the side-track, more cars could not have been placed upon it and unloaded than were actually placed upon it and unloaded there during the times in question, to-wit: about two or three cars a day.

6. That each and every of the cars in question was held at destination on account of congestion of defendant's private side-track, due to its inability to unload and awaiting orders from defendant.

7. That when each of the cars in question arrived, the plaintiff notified the defendant of each arrival by telephone, giving the car numbers, and, according to the general custom, with only occasional exceptions, the plaintiff held the cars until defendant notified it to place them upon the side-track for unloading.

8. That defendant did not order the cars placed for unloading sooner than as shown in Exhibits B and C, attached to the complaint, because, practically, defendant could not handle any more cars than it did, and hence did not ask for them.

9. That no request or demand was ever made by order to spot cars or otherwise that plaintiff spot cars for unloading on any public delivery track or any place other than defendant's said private side-track, and that defendant would have been at all times unable to unload said cars had they been so spotted.

10. That there was no delay on the part of the plaintiff in switching the cars upon the side-track, or refusal or inability of the
40 plaintiff to place the cars, nor any insufficiency of terminal facilities, nor any congestion in the yards of the plaintiff which prevented the placing of cars upon the side-track in question when ordered.

11. That the charges for demurrage in question should be computed according to the rules of the Wisconsin Car Service Association, shown as Exhibit A in plaintiff's complaint.

12. That the schedules attached to the complaint, Exhibit A, were tariffs for computing demurrage charges, duly prepared, printed, posted and filed with the Railroad Commission of Wisconsin and the interstate Commerce Commission.

13. That none of the cars on which demurrage accrued were through consignments not held for orders.

14. That the demurrage sued for accrued at destination.

15. That there is due to the plaintiff from the defendant for demurrage upon the cars mentioned in Exhibit B attached to the complaint, the amounts therein set forth, aggregating $104.00, from which there should be allowed deductions, as set forth in said Exhibit B, computed according to the Car Service Rules, amounting to $70.00, leaving a net balance of $34.00 to the plaintiff under Exhibit B.

16. That there is due to the plaintiff from the defendant, for demurrage upon the cars mentioned in Exhibit C attached to the complaint, the amounts therein set forth, aggregating $1,419.00,
41 from which there should be allowed deductions, as set forth in said Exhibit C, computed according to the Car Service Rules, amounting to $435.00, leaving a net balance of $984.00 to the plaintiff under Exhibit C.

17. That on March 14th, 1908, the plaintiff, at the request of the defendant, and not by reason of any conditions on its line necessitating such notice, notified the plaintiff's agents in Wisconsin and Michigan, "until further advised," to discontinue to furnish equipment to load with bolts for the defendant; that this arrangement, called an "embargo," did not run out until the close of the year 1908; that this "embargo" did not by its terms cover logs and was not thereafter modified by an agreement of the parties to cover logs; that in April and May, 1908, the said limited number of cars from certain shippers were forwarded by the plaintiff to the defendant upon defendant's request, but that such cars were not included among those set forth in Exhibits B and C, attached to the complaint; that after shipment of these cars, the "embargo" was applied again, so that it was the agreement between the plaintiff and the defendant not to ship any bolts to plaintiff, but this agreement was violated, and the cars mentioned in Exhibits B and C were shipped in violation thereof, and were shipped without notice from the plaintiff to the defendant of intention to ship the same, resulting in the arrival of cars in great numbers on certain days, as more particularly set forth in the exhibits attached to the complaint, and as a result of the violation of
42 the embargo agreement as to bolts, hereinbefore found.

18. That in July 20, 1908, and again in September, 1911,

the plaintiff duly demanded of defendant payment of the demurrage set forth in the complaint; that defendant refused and assigned as its sole ground for refusing to pay, the existence of the said embargo order.

Conclusions of Law.

1. That plaintiff is entitled to recover of the defendant the sum of $34.00 for the demurrage set forth in Exhibit B, attached to its complaint, and the further sum of $984.00 for the demurrage set forth in Exhibit C, attached to its complaint, making in all a total of $1,018.00, together with interest thereon from July 20th, 1908.

2. That defendant is estopped from urging any defense other than the existence of the said embargo.

3. That the embargo arrangement found in Finding 17, was and is illegal, contrary to public policy, and void.

Dated March 13th, 1914.

Respectfully submitted,

JOHN F. HARPER, *Referee.*

Order of Circuit Court confirming referee's report.

Judgment.

(Title of Cause.)

The above entitled action having been at issue and having
43 been duly referred to Hon. John F. Harper, Esq., as referee, to try, hear and determine, and the said action having been duly tried before the said referee, and he having duly made his report thereof, including findings of fact and conclusions of law, and the same having been duly confirmed by the court:

Now therefore, On motion of Lines, Spooner, Ellis & Quarles, attorneys for plaintiff,

It is ordered and adjudged, by the Court, that the said report of the said John F. Harper, referee, be and the same hereby is confirmed.

It is further ordered and adjudged, That the plaintiff do have and recover of the defendant the sum of Thirteen Hundred and Seventy-four and 63/100 Dollars damages, and Forty-nine 60/100 Dollars costs, being in all the sum of Fourteen Hundred Twenty Four and 23/100 ($1,424.23) Dollars.

Dated this 22nd day of May, 1914.

By the Court,

JOHN H. LAABS, *Clerk.*

Bill of Exceptions.

(Title of Cause.)

Stipulation as to bill of exceptions.
Notice of hearing by referee and admission of service.

The following is the testimony introduced by plaintiff to maintain its issues:

44 T. H. THOMPSON testified for plaintiff with regard to books of account, and his testimony is not abstracted in full. Was ticket agent and car clerk for the Northwestern Road, at Neenah and Menasha, in 1908.

Cross-examination:

Q. How did you ascertain whether or not that car was ordered on the 13th of July?
A. By telephone generally.
Q. Were you the only person to whom such orders came?
A. No, sir.

There was a certain bunch of those cars placed at Snells, understand, but we had to keep a record of those cars on account of there being no agent at Snells. And naturally it would be just the same as though the cars were at Neenah and Menasha, only there was not room in the yards to keep them. In other words, this record would not show whether the car was being held within the yard limits of Neenah or outside of it.

With reference to those cars that I saw were taken to Snells, they were probably brought to Neenah first and the yards being congested, they had to be taken to Snells, to be stored away in order to do switching. Snells is a siding, I think, five miles south of Neenah. The cars in question originated from points north of Neenah and Menasha and could not be taken to Snells without going through Neenah and Menasha.

45 JAMES O. KLAPF testifies about the alleged destruction, by fire, of the record books in 1908.

T. H. THOMPSON resumed his direct testimony as follows:

When cars came in during this period, consigned to the Menasha Paper Company, I would notify them by telephone that the cars had arrived in the yard. I don't remember who was at the other end during my conversation at the phone but we would take a bunch of way bills which covered the cars in question and read them off one after another. I would tell them, for instance, eight cars of shingle bolts arrived this morning and, if I remember correctly, I would give them the numbers and the points of origin. I would telephone on the day of arrival. That day is shown as arrival in the book, Exhibit 27.

That entry of the date of arrival in that book was usually made after the telephone conversation. Notices of arrival while I was at Menasha were given to the Menasha Paper Company by telephone. They never were given any other way that I know of.

I had occasion to examine the unloading track of the Menasha Paper Company during this time. If I remember right, I think there was always plenty of cars there to unload.

Cross-examination:

Q. Would these cars come from the north and go through
46 Neenah and Menasha without stopping?

A. No, I don't think these cars that were placed at Snells did go through Neenah and Menasha. I think they stopped at Neenah and Menasha for a certain length of time, I don't know how long. But finding that they were coming in too fast, causing congestion, they had to be placed at Snells in order to make room.

I don't know exactly how long the cars were held at Neenah. But when I notified the Menasha Paper Company, they probably were at Neenah and my recollection is afterward they were put out to Snells, because of more room being at Snells. I never served notices by postal cards nor by mail.

Prior to June and July, 1908, there was quite a congestion of cars of all kinds at Neenah and Menasha.

To the best of my knowledge, there was a congestion at that time.

Q. Isn't it a fact that owing to the congestion that occurred during the months of June and July, 1908, it was impossible for you to take out cars and spot them on the Menasha Paper Company's side-track in the order in which they were received at Neenah and Menasha?

A. Yes, I do.

Q. Isn't it a fact that in some instances, some cars, through the congestion, were left on the outskirts of town or at Snells, and new cars coming in were immediately placed and unloaded?

A. Yes, sir.

47 Orders were given by the Menasha Paper Company to place a certain number of cars for unloading when they had a place for them to unload.

Q. If you got no orders, what would the railroad company do with the cars?

A. Hold them for instructions. When I was instructed to place so many cars for unloading, no car numbers were given, but I simply was told to place five cars for unloading. The station agent, myself or the yardmaster used his discretion as to what cars he placed.

When I called up the Menasha Paper Company and told them that so many cars had arrived, I don't remember what the exact conversation was. They would probably say: "Much obliged," and that was about all. That is all they could say.

C. S. EVENSON testified that in June and July, 1908, he was cashier of the Chicago & Northwestern at Neenah and Menasha. I would notify the Menasha Paper Company of the arrival of cars by telephone, from the reference on the bill, giving the point of origin, shipper's name, the car number and contents. I know of that's being done that way, from the time I went to work there about October, 1907. When I called the Menasha Paper Company up, no particular conversation occurred. I would give them the information regarding the car numbers, point of origin and shipper's name and when I had finished giving them the cars that arrived during the last 24 hours, or sometimes 12 hours, they would just acknowledge that they had got the information.
48 I would then report it to Thompson, the car clerk. I would receive orders for placing cars from the Menasha Paper Company by telephone. They would simply say that they are in shape to handle a few cars of timber bolts for the shingle mill but would not specify the car number. They didn't always say how many cars they wanted.

They did not always receive orders because the switchmen, yard master, if they would see empties in there, would take the empties out and place cars in without orders.

Q. When would you get orders then?

A. At no specified time that we would receive them. If they had empties down there and they wanted loads in, they would call our office up and we would write the order in what they call the order book—instructions to the yard master. John Ryan was the yard master at the time. When the order was checked off in the book, I would know that the order had been completed or the work had been done.

I did not receive any objections during June and July, 1908, from the Menasha Paper Company, about any such orders not being carried out. The capacity of the Menasha Paper Company's unloading track at that time was about seven cars. I am not very familiar with the piling ground that the Menasha Paper Company had at that time. In June and July, 1908, it was full of logs or bolts.

I wouldn't like to say whether the pile was five feet or thirty
49 feet, because I don't remember the height of the pile. They were unloading part of the time by horse power. I couldn't say they done all their unloading that way but they done part of it.

Q. Did they unload at all direct to the saw?

A. Yes, that is where they were unloading at the time I mentioned, June and July.

Q. Do you know how many cars a day they could unload, during that time, in that way? I mean, how many cars they did unload?

A. Three and four.

No objections were made to me that the Menasha Paper Company were not getting as many cars to unload as they could handle. If those objections had been made, I might and I might not have heard of it.

Cross-examination:

When I notified the Menasha Paper Company, they would just acknowledge that they had got what I had telephoned. That is as far as they would go at that time. When I called them up and notified them, the cars would be ready for delivery as soon as they would want them. By that, I mean that the cars would be on hand where we could deliver cars to them any time that they would want them, and that they would be ready to unload them. The cars might be in any part of the yard or all over the yard. Neenah and Menasha is one yard. It is hard to say the distance they would be from the Menasha Paper Company, possibly a distance of three or four
50 blocks, I am not positive of that distance, really. That is a happy medium, I guess.

The yard limits, I should imagine, are about between a mile and a mile and a half. A car might be anywhere in that yard limit when I notified them.

Q. Do you know whether or not you received any orders from the Menasha Paper Company to hold any of the cars named in the complaint?

A. Oh, no, I couldn't tell you anything by looking at the car numbers.

I notified the Menasha Paper Company of the arrival of cars in June and July, 1908. I won't say that I notified them of every car, because Mr. Thompson would notify them of cars when he was in that office, but when he was not there, I would notify them; it was put up between us.

Q. Would the Menasha Paper Company tell you to hold the cars when you would call them up, or would they simply say they had a notation of what the cars were?

A. Just acknowledge receipt, that is all. I received orders to place cars during the months of June and July, by telephone, from the Menasha Paper Company.

Q. Do you know whether during that period of time, any cars were held at Snells siding?

A. Yes, sir, they were.

I can't say that the movement of freight in the Neenah-Menasha yards during the year 1908, was heavier than it averaged
51 at any time while I was in their employ. There was considerable freight considering the bolts that we were holding for the Menasha Paper Company. We had a fair business, but it was a detriment, having so many cars in the yard holding. We had no cars of pulp wood in our yards at that time.

We had very few for the Island Paper Company, that is all.

Q. Isn't it a fact that the Island Paper Company, during that period of time, received more cars than the Menasha Paper Company?

A. I couldn't say. I couldn't say how many switches we gave the Menasha Paper Company during June and July, 1908, nor how many engines we had working in that yard, or anything about the general yard conditions.

I believe the usual storage yards of the Northwestern were four

or five blocks from the Menasha Paper Company tracks. I don't know the exact distance Snells siding is from the Menasha Paper Company track. I think it is something like eight miles though; that is only an estimate, however.

JOHN RYAN testified as follows:

Am yard master, C. & N. W., at Neenah and Menasha, Wisconsin; been in that business about 12 years and was in that business in June and July, 1908. My duties as yard master, at that time, was to check over all cars that come in and go out and place them for loading and unloading and make up trains and so on; gen-
52 eral work around the yard.

I have searched for the order book and couldn't find it. I couldn't say what became of the order book, for 1908, unless it was lost in the fire.

In June and July, 1908, the yard room at Neenah and Menasha was one yard; that is, Neenah and Menasha, the line runs right through the middle of the yard; that is, Menasha is on one side and Neenah on the other. It is simply a streak. Mr. Ballou lives in Menasha and the armory is in Neenah. It is the dividing line. If the freight comes from the north, it has got to go through the Menasha yard first before it can get into the Neenah yard.

This one yard served both towns. Snells siding is about four miles from the spur serving the Menasha Paper Company. I am familiar with the track serving the Menasha Paper Company; it would hold about seven cars. I think, at that time, the Menasha Paper Company were unloading wherever they could get a chance to unload. Their piling ground was loaded to its capacity, I should judge.

I saw about all the wood they could pile there. There couldn't be any more piled, I don't think, unless they piled it higher than it was. Of course, there was lots of room up in the sky. It was piled, I should judge, 25 or 30 feet high. The piles couldn't be very steep because if they were, they would fall down. There had to be
53 slant enough so that they wouldn't fall down. They had shingle timber piled between the armory and the stock yard, on our back track and between the back track and the track we called "Spain." That was put in there at the time of the Spanish War, and we called the track "Spain." Also they were piled across from the shingle mill near Mr. Ballou's office. The track serving the Menasha Paper Company during this time was always or mostly always filled with cars.

There was an order book and the orders were to spot so many cars. Sometimes the orders were designated this way: "Three cars of bolts at the saw mill and three cars of logs for piling." I did not spot cars without orders customarily. Those orders would go through the book and once in a while they were given by Mr. Ballou, as he would meet me going by the mill, or his foreman, George Mayer. If I remember right, this track served nobody but the Menasha Paper Company during that time. There was never any objection on the part of the Menasha Paper Company, that they did not get cars enough to unload at this time, that I know of. Certainly two

switches per day were made to the Menasha Paper Company, sometimes three.

Q. Did you ever make any special switches for them?

A. Well, I have, at certain times, been requested by Mr. Ballou, or his foreman, to place cars so that they could unload them Sunday.

I made a special switch to do so in the evening. Because I
54 would have to leave those cars on what we call our open track.

Leaving them there, other dates would interfere with our commodities or other firms.

Q. How long did it take you to move cars from the Neenah and Menasha yards to the siding serving the Menasha Paper Company, and spot them there? Part of a day or several days?

A. It was always done the same day.

Q. Some reference has been made, Mr. Ryan, to certain cars being hauled down to Snells. Can you recall whether or not those cars came into Menasha before they were taken to Snells?

A. Yes, sir.

Q. Can you recall whether or not all the cars, for which way bills were received, were checked by you, and whether or not they were all found at Menasha at the time of the receipt of the way bills?

A. Yes, sir.

Q. Do you know how many cars were taken down to Snells?

A. I couldn't give you the exact number.

Q. What would be your estimate based on your knowledge of the siding there? All my questions are directed to the period of June and July, 1908?

A. Somewhere about 26 or 27 cars, I think, altogether. The track room will hold 75 cars down at Snells. At the time those cars were at Snells, I know whether there were also cars at the Neenah and

Menasha yards consigned to the Menasha Paper Company.
55 I know whether they were at all that time such cars which had

been there over two days. In spotting cars, I would try to get the oldest cars that were in the yard, that was a standing order, to spot the oldest cars first. We might make a mistake once in a while and get a newer car, but they were all over two days. The Menasha Paper Company, at that time, were unloading direct to the saw. They could saw about three or four cars a day, depending on the timber. They could not handle any more at the saw.

Objection.

Referee: There was a question in my mind as to what he knew about that.

The Menasha Paper Company unloaded on an average from three to four cars at the saw for this time. If the bolts were poor, they would unload four or five. If the bolts were not poor, they would not unload so many.

Cross-examination:

Q. Mr. Ryan, isn't there any time when you go to the yard when you would see them getting out from the pile to the saw, because you did not have any cars switched at the saw—during July and August, 1908?

—. Once in a while such things would occur. This order book, that I testified about, was simply a memorandum book that I took my orders from the office, and I went out and did whatever was in that book. It was a sort of an instruction book to me—whatever was in there I did as a good yard master should. It is not a general
56 practice when a car is destined, for instance, to the Menasha Paper Company, at Menasha, for me to spot that car on their siding, without any orders under ordinary circumstances. I would have no right at all to spot that car, unless I knew the bill of lading was there.

Q. So it is your duty not to spot anything until you got the orders from the station agent?

A. Yes, and I always find out whether there is a bill of lading on those cars or not. If there is no bill of lading, I have a perfect right to spot the cars.

I testified I gave them two or three switches a day, on this side-track. How many cars I gave them, on each switch, would depend on how many they wanted.

Q. Wouldn't you take into consideration how many cars could go on that side-track.?

A. Yes, sir. If they ordered three cars, I took three of them, and if they ordered six, I took them. I couldn't tell you generally about how many was on each switch.

If I gave them three switches and cleared the track each time, I could put twenty-one on if they were empty, but that never happened. In spotting the cars on the Menasha Paper Company's side-track, I had to cross the main line. When the trains was running, I had to stay in the clear; if it was a passenger train. I am supposed to clear them ten minutes. They had nine passenger trains going through there at that time daily and I had to clear them by ten minutes.

57 Q. Was it possible for you to go over and get cars any time that the Menasha Paper Company asked you for cars?

A. Not right at the minute or hour, probably, but it was always possible that day.

Q. Within the day?

A. Yes, sir.

I don't know how many switch engines we had doing switching in Menasha and Neenah. At that time the capacity of the yard at Neenah and Menasha was 175 cars and it was filled. The yard at this time was so full that I also had to use Snells siding or block the main siding. During that time not all of those 170 cars that I had in the main yards did not belong or were not consigned to the Menasha Paper Company. There was a time, I couldn't give you the date, that I know there was some remark made about it at the time that I had 15 or 18 cars of the Menasha Paper Company's bolts in the wooden ware lumber yard. That was in June and July, 1908.

Very often the wooden ware would have a train of logs come in, but we would never have a congestion on the wooden ware logs, because they were promptly handled because we had a good place to unload.

Q. Some of these cars were held for a month. State where they were held during that time?

A. They were held at Snells.

Q. How soon after they arrived at Menasha were they taken to Snells?

58 A. I don't think it was three or four hours.

Q. They went through Menasha. Way bills were handed to the agent and then you were crowded for room?

A. They came to Menasha and I asked the agent to have those cars taken to Snells; we had so many bolts for the Menasha Paper Company at present that I could not handle them.

I should judge we had over 15 or 18 cars at Neenah and Menasha for the Menasha Paper Company.

Q. If the car demurrage only accrued on 40 cars, 44, and on them it is during two months, would that indicate to you in any way how many cars were at Neenah and Menasha for this company?

A. Well, I am trying to give you an answer the best I can. Those cars I had moved to Snells on conditions that we had bolts enough at Neenah and Menasha to run the Menasha Paper Company for three weeks sawing, at the saw, and when those bolts were sawed up, we would have the cars returned just as they wanted them.

Q. During this period of time, were not cars of bolts coming in all the time for the Menasha Paper Company?

A. Yes, sir, there were a few coming in. There was, I think, an embargo set on them so that they could not come in very fast. I couldn't say when the embargo was set on them, but we were receiving cars from the Soo line and the St. Paul line.

59 Q. If cars were coming in during the period of time that these cars referred to in the complaint were at Snells, why didn't you deliver the Snell cars to the Menasha Paper Company, instead of the new arrivals?

Objected to as immaterial.

Overruled.

Exception.

A. We were receiving cars from the St. Paul road and receiving cars also from the Soo line, for the Menasha Paper Company, that there was car service on, their agent claimed, and as a rule, we spot foreign cars in preference to our own to save per diem.

Q. Isn't it a fact that during the time that they were unloading to the saw, in June and July, 1908, they were also unloading in some of the adjacent territory, adjacent to this track?

A. The fact is, wherever they could get a chance to unload, they were unloading all the time. But their places were all filled. When I stated I tried to spot the oldest cars first, I meant that if cars came in tomorrow, we would spot those that came in to-day, to try and get the oldest cars out of the way first. If they came in on our own line, we did not differentiate between them. The cars that were sent out to Snells came in on the Northwestern. We spotted a few cars across the road from Seller and Whittemores for them to unload.

Our yards were pretty well congested during that period. There

was an awful lot of shipping going on or the yard wouldn't be congested.

60 Very little of that was pulp wood. Most generally all the pulp wood we had to handle, I handled through the main siding, because that went right straight to Appleton Junction from the Soo transfer. As to the congestion of Appleton Junction yard, I could not say. Everything that we sent over to Appleton Junction was taken care of during that time.

I said that they placed an embargo on these bolts for the Menasha Paper Company, but I didn't say what time or how or when. I couldn't tell you when it was released. There was about five cars a day of pulp for the Island Paper Company, which did not go to Appleton Junction, in the months of June and July.

Redirect examination:

Snells is the next nearest siding to the Neenah-Menasha yards.

Q. In case cars had not been spotted, as requested, or switches had not been given, as asked for by the Menasha Paper Company, would complaint have been made to you?

Objected to as calling for a conclusion as to whether somebody else had performed their duty.

A. Certainly.

Referree: I will take it as a statement of what happened within the witness' experience, in the ordinary line of his duty. The answer may stand.

Q. Do you now recall any such complaint in June and
61 July, 1908?

A. Very few. Ballou always said I was a good switchman.

Q. How did the Menasha Paper Company handle the cars when they unloaded direct to the saw? Did they have to pinch them down and spot them in front of the saw?

A. Yes, sir, we could only spot one car. That is, they would unload the one-half the car, if it was a car of logs. They would unload half at a time, and we would generally put three or four cars behind. They unloaded that half and pushed it down and half unloaded it, and so on till they got them all off.

Q. When they were unloading that way, could they do that if they had seven cars spotted on a siding?

A. No, not without a switch.

Recross-examination:

There was a few cars held there over 48 hours, in the yards, that were consigned to other shippers or other consignees than the Menasha Paper Company. They were destined to the Menasha Woodenware Company. There were not many to the Island Paper Company, not over five cars at any one time; any one day.

Kimberly-Clark Company were very prompt in unloading their cars. They certainly did have cars there over 48 hours that were

held. I said the Island Paper Company had only about five cars at any one time. The Menasha Woodenware Company had cars which were held in the yards or on the unloading tracks over 48
62 hours—six cars a day, I wouldn't say anything about.

Q. Isn't it a fact that there was a general congestion there and you were doing the best you could to handle it, and everybody was trying to clear it up, and that was all there was to it?

Objected to as calling for a conclusion.
Objection sustained.
Exception.

H. R. WILLIAMS testified that he was chief inspector Wisconsin Demurrage Bureau, and that he prepared Schedule "B," attached to plaintiff's complaint.

Witness testified that after making some investigation of the accounts and charges, he found some overcharges that had been made by the car clerk, in assessing the demurrage. Also found some due on account of the weather in bunching; also some errors in the dates of release, in which the agent's record could not be verified. Cars set in ahead. Also some allowances on days on which no switching was given. The cars on which allowances were made, were being held at Snells. I diminished the amount assessed $435.

The amount of car service that is being asked for, in this complaint, is $1,018.00. The car service shown by the daily reports of the station agent, as being charged against the Menasha Paper Company, is $1,553.00.

The difference between the two statements consists of errors made by car clerks, such as overcharge, charging for holidays, error
63 in figuring demurrage and weather, which accrued in the free period; also the bunching of the cars by the railroad company. Errors in dates of releases, and one charge of $26.00, on a car which was lost, that fell off en route and was picked up and delivered and was less than a carload shipment.

Redirect examination:

It was my duty, when payment of charges was refused, to call on consignees and effect settlements according to the rules in tariff. I have called upon Mr. Harry Ballou, of the Menasha Paper Company, at least once a week for the last ten years, whether I had any business or not. With reference to these particular charges, in 1908, I have a letter here that I attached to my statement when I made it up, September 14th, 1908.

I took up the question of collection of the bills with Mr. Ballou. He claimed that the bills were not correct and should not be charged on account of the embargo which was placed against them and was raised before they were ready for the material. There might have been some other questions come up, but I don't recollect that there was. To the best of my recollection, it was on account of the North-Western, after putting out the embargo, raising it without their sanction.

To the best of my recollection, that was the sole reason. I have taken up with Harry Ballou statements of accounts due for demurrage and have settled and collected from him.

64 I think all the demurrage of the Menasha Paper Company was settled with Mr. M. H. Ballou prior to this. The only objection Messrs. Ballou, prior to the commencement of the suit, made to the statement, Exhibit "B," was the question of embargo and also the question of switching service came up; also the bunching of the cars. Those are covered in my allowances. I cannot recollect anything else which has not been allowed for. I think I made allowances for all exceptions that was taken.

Cross-examination:

I allowed $36.00 for cars held at Snells, between July 25th and August 1st, on account of switching.

I had authority for making allowances under Rules 9, 11 and 12, would cover it all.

Mr. Ballou also told me that he would not pay because they had raised the embargo without notice to him, and shipped these cars, as indicated, in bunches of 13 and 14 cars on one day, without notifying him that the embargo had been raised and that the result was, that these cars came in upon him in a bunch. From my examination of the records, I found that from the 6th of June, 1908, and during the months of June and July, other cars were being received by the Menasha Paper Company and unloaded within the 48 hours free time allowed by the rules.

Q. And that other cars were being received and unloaded within the 48 hours, while these cars were at Snells siding, from the

65 6th of June to the 12th of July?

Objected to.
Overruled.
Exception.

A. Yes, sir, a few cars.

J. O. KLAPP testified that he was manager of the Wisconsin Demurrage Bureau and testifies as to the making of the exhibit to the complaint.

I tried to collect this amount from Mr. Ballou and invariably the defense that he offered was his objection to the Chicago & North-Western Railway failing to carry out the embargo upon cedar bolts, creating a highly congested condition and giving him more material than he could handle. He did not raise any other objection.

Exhibits 25 and 26 offered and received. Letter from Klapp to Ballou and from Ballou to Klapp.

Exhibit 25 reads as follows:

"CHICAGO, September 18, 1911.

Mr. James O. Klapp, Wisconsin Demurrage Bureau, Milwaukee, Wis.

DEAR SIR: Replying to your favor of the 15th, as I understand this demurrage matter at Menasha, it resolves itself into this question.

We asked the C. & N. W. people to place an embargo on our material coming into Menasha, which they done. They afterwards raised the embargo without any instructions from us and without informing us that they done so. This, as I understand it, they deny. However, we have ample proof that these are the facts. This being the case, I do not think that we should be asked to pay any car-service on this material, as far as the amount of car-service accrued. Harry and Mr. Williams figured this out as to the actual delay on the cars.

66

Our position is that the R. R. Company is entirely to blame by shoving the stuff to us without any notification from us after they had put an embargo on the movement of same.

Yours truly,

MENASHA PAPER COMPANY.
M. H BALLOU."

I will have to modify my previous statement. Subsequently, Mr. Ballou raised the question of allowing this demurrage to stand until what was commonly known among us as the pulpwood suits were settled. That was subsequent to my original visit with him, however. These cases have been settled now.

Exhibit 24 offered in evidence. Letter from Harry Ballou to Mr. Klapp.

Plaintiff offers testimony of Harry Ballou, taken under Section 4096 of the Wisconsin Statutes, as follows:

Am secretary and local manager of the Menasha Paper Company. In June and July, 1908, was purchasing agent and I suppose chief clerk to the general manager would be the best way to express it. M. H. Ballou, my father, was general manager. I had charge of the settlement and payment of demurrage claims at the Menasha mill.

67

It was my duty to ascertain whether the bills were correct on behalf of the Menasha Paper Company. I do not remember agreeing to pay if my father, M. H. Ballou, would consent. I am not sure whether I did or did not. It is self-evident that if he instructed me to do it, I would do it whether it was right or not.

M. H. BALLOU testified that he is general manager and vice-president of the Menasha Paper Company, held the same position in June and July, 1908, and had authority to settle demurrage charges with the plaintiff railroad.

Plaintiff rests.

Motion by defendant to dismiss the complaint for want of sufficient evidence to sustain it.

The following testimony was introduced to sustain the issues for the defendant:

M. H. BALLOU testified as follows:

I do know, in a general way, that the freight yards of the Chicago & North-Western Road were very much congested, at Neenah and Menasha, during the months of June and July, 1908. In order to reach the side-track, at which cars were spotted to my mill, the switching crew had to go out on the main line and run across the river to get to the track leading in onto the water power, from which our track is diverged. In the months of June and July, 1908, I asked the North-Western Railroad for additional switching.

68 I asked the agent, Mr. Zoelle. I asked to have the cars switched to the ground adjacent, belonging to the John Strange Paper Company, switched to the track adjacent to those grounds. I got one car switched there. I had an unloading crew.

Objected to as immaterial.
Overruled.
Exception.

Fifteen men were in this unloading crew. One car was delivered at this point. I kept my unloading crew there.

Objected to.
Overruled.
Exception.

I asked for more cars and did not receive them. I discharged the unloading crew next day, not receiving any more cars. There were other times, during the months of June and July, that I could have accommodated more cars in the way of unloading. I did not unload more cars than were unloaded during that period of time, because we could not afford to pay the crew and wait for cars to be placed to unload. I don't remember whether or not any car service accrued on our side-track. I don't believe there was any but there might possibly have been.

Had the company given us more switches, we could have accommodated them by unloading more cars. We had sufficient room to unload more cars.

Objected to as immaterial and calling for a conclusion.
69 Overruled.
Exception.

Q. I will state to you that the car service, as shown by the record here, had accrued on about 44 cars, during the two months in question; had these cars been delivered to you, could you have had the space for unloading and piling up of that wood, outside of what you were using at the saw?

Objected to as hypothetical and something not in proof.
Overruled.
Exception.

A. Yes, sir. We had space that we could have put it in. We never requested any officer, agent or employe of the Chicago & North-Western R. R. Company to hold cars for us, at Snells siding or any

other place. I know in a general way that the yards at Neenah and Menasha, of not only the North-Western R. R., but the Wisconsin Central and the Chicago, Milwaukee & St. Paul, were very much congested. There was a congestion in the Fox River Valley, at that time of my own knowledge. The shipments of pulpwood, in that year, were very large. I think it was the greatest up to that time that we ever had. There was an embargo on bolts destined to our mills.

It was that spring. I am quite positive we never had any notice of the raising of the embargo. The company never received a notice that the embargo had been raised, to my knowledge. I think the track, upon which the cars were spotted, along side of our
70 mill, belonged to the North-Western Railroad. I always assumed it was theirs, because they kept it up. The North-Western keeps it in repair.

Cross-examination:

I cannot recall the date when I asked Mr. Zoelle for additional switches to the John Strange Paper Company property. My recollection is that I called Mr. Zoelle up. It might possibly have been one of the men in the office; told him I had arranged with the John Strange Paper Company to unload cars on their property and asked to have more cars over there, and stated that we could unload from 10 to 12 cars a day. This property to which I refer, was about two blocks from our piling ground. I think it would accommodate, the way we were piling stuff in our yard, in the neighborhood of 100 cars.

It was on the railroad's main line track, leading into the water power.

I repeated that request for additional switches, for that property, to Mr. Ryan the day that he brought one car over. I asked the cars to be placed right in there where they dump their cinders.

Witness marked with an "A," on plaintiff's Exhibit 31, the place mentioned.

I had other property other than I have indicated on this plat, on which we could have unloaded more cars at the time in question. That was at my house, my individual residence. I requested cars to be spotted there for unloading during this time.

I say yes—it has been done from our office. I cannot say
71 that I did because I did not have personal charge of that work. I think I did make requests, at other times, during June and July, 1908. To whom and when and where, I wouldn't want to answer. Four years is a good long while to remember.

I knew there was an embargo placed by the North-Western on cars for bolts. I based it particularly on a letter that we received from one of our shippers.

I saw the yards full of cars, both loaded and empty.

That condition does not exist a great portion of the year.

From my observation, I would say that approximately a third of the time the yards are congested. We had no contract arrange-

ment with the North-Western respecting the ownership of the track, to my knowledge.

We had unloaded shingle timber in June and earlier in the spring of the year 1908, on other than the piling ground. We unloaded some on the North-Western right of way and some in my own yard, at my residence. It was piled about 12 feet high, in my back yard and about 25 feet in the piling grounds.

It is possible that our receipts of cedar bolts for the season of 1908, were in excess of our usual receipts. We had unloaded timber of that sort on the railroad right of way and in our back yard. We had done it before and have done it since.

I don't think there was as much excess in cedar products
72 shipments as there was in pulpwood that year.

Defendant's Exhibit 32 copied into the record as follows:

"Chicago & Northwestern Railway Company.

Superintendent's Office.

Ship'ts for Menasha.

ESCANABA, MICH., May 20th, 1908.

Mr. F. G. Hood & Co., Pentoga, Mich.

GENTLEMEN: Yours of the 18th in reference to shipments to Menasha. As the matter now stands, there is an embargo on loading for Menasha Paper Co., placed by our Chicago office, which will necessarily have to be removed before we can place cars for you to load. The Menasha Paper Co. should take the matter up with the Freight Department, for such release as they may desire. We can supply cars when embargo is raised.

Yours truly,

R. F. ARMSTRONG."

F. J. ZOELLE testified as follows:

Am agent of the Chicago & North-Western, at Madison, Wisc. Was agent of the same road, at Neenah and Menasha, in 1908. During the spring of 1908, there were two embargoes on wood bolts destined to the Menasha Paper Company. The first one against the Chicago, Milwaukee & St. Paul Railway and the second one against the Wisconsin Central Railway, was issued Febr. 13th, 1908,
73 by myself. This embargo was raised, I believe—I can't say definitely—for about a period of three days, during the latter part of July, but was immediately applied again.

On our road an embargo was issued on March 14th, 1908, by the General Freight department. I don't know that it was ever raised. I think that it ran out with the year 1908, as all embargoes do. I do not remember of receiving any complaints during the spring of 1908, from the Menasha Paper Company, as to the switching that the company was receiving.

I received a request for permission to unload on the premises of Mr. Ballou and Mr. Sanford. That request was even extended fur-

ther than that at the time, if my knowledge serves me correctly. I was also asked for permission to unload on the Northwestern right of way and I granted it. I don't remember receiving the letter that you now hand me, dated Jan. 30, 1908. The correspondence that passed between the Menasha Paper Co. and myself relative to this situation, it may be possible, was lost in the fire testified to today.

Cross-examination:

The embargo that was issued by the Northwestern was in writing, and this is a copy of it.

Plaintiff's Exhibit 33 copied into the record as follows:

74 "Chicago & Northwestern Railway Co.

General Freight Department.

CHICAGO, March 14th, 1908.

Embargo Notice No. 383.

To Agents in Wisconsin and Michigan:

On account of accumulatio.., you will until further advised discontinue to furnish equipment to load with bolts consigned to the Menasha Paper Company.

Please be governed accordingly.

MARVIN HUGHITT, JR.,
Freight Traffic Manager, Chicago, Ill.
E. D. BRIGHAM,
General Freight Agent, Chicago, Ill."

Plaintiff's Exhibit 34, together with three letters attached, offered in evidence, as follows:

"Menasha Paper Company,

April 17, 1908.

F. J. Zoelle, Agt. C. & N. W. Ry., Neenah, Wis.

DEAR SIR: Referring to the attached. Will you please take this up with your proper department and accommodate this party at once if possible to do so, as we can arrange to unload these cars when they arrive. The party is in danger of fire and as there are but 8 or 10 cars, the shipments will not be large enough to cause any trouble.

Yours truly,

MENASHA PAPER COMPANY.
HARRY BALLOU."

75 "PERRONVILLE, MICH., 4/16/08.

Menasha Paper Co., Menasha, Wis.

GENTLEMEN: Replying to your kind favor of the 15th inst. It will take 8 to 10 carload to ship the remainder of my shingle bolts and logs. Please notify the R. R. Co. to set in cars as per my order on an average of 2 cars per day. Hoping that you will notify them at once to that effect and let me hear of you again that you have done so as I am really afraid of fire.

Yours very truly,

FELIX PERRON."

"April 15, 1908.

Felix Perron, Perronville, Mich.

DEAR SIR: Replying to yours of the 14th, regarding empty cars for cedar to Menasha. Will you please advise by return mail about how many cars you require for this cedar and how many per day is necessary. We will then take the matter up with the railroad company and endeavor to do something to help you out.

Yours truly,

MENASHA PAPER CO."

"PERRONVILLE, MICH., 4/14/08.

Menasha Paper Co., Menasha, Wis.

GENTLEMEN: I beg to inform you that the R. R. Co. refuse to set in cars recently ordered being for the shipment of cedar shingle bolts and logs to fill in the contract that I have with you. I am anxious to ship this material in question for want of funds and said timber will be in danger of fire.

76 Kindly notify the Railroad Co. to furnish me cars as demanded and let me hear of you regarding the same.

Yours very truly,

FELIX PERRON."

Plaintiff's Exhibit No. 35, offered in evidence as follows:

"Chicago & Northwestern Railway Co.

Office of Local Agent.

NEENAH, WIS., April 18, 1908.

Mr. W. B. Linsley, Supt., Escanaba, Mich.

DEAR SIR: Please note letter attached from the Menasha Paper Co. advising that Felix Perron of Perronville, Mich., had ten cars of bolts which they were ready to accept.

Will you please arrange to furnish the equipment to handle this timber. I will advise you from time to time, at what points to furnish cars for loading, as the Menasha Paper Co. only want to take

in the timber that is actually contracted for. Expect to be able to raise the embargo on all shipments some time in May.

Yours truly,

F. J. ZOELLE, *Agent.*"

"Chicago & Northwestern Railway Co.

Cars for Felix Perron, Perronville.
Shipments for Menasha Paper Co.

77 Superintendent's Office.

ESCANABA, MICH., April 20, '08.

Mr. F. J. Zoelle, Agent, Neenah, Wis.

DEAR SIR: Answering yours of the 18th, and returning papers in regard to furnishing cars for loading bolts to go to Menasha Paper Company. There is an embargo on shipments going to Menasha Paper Company, and until this is raised, we cannot furnish cars for this loading.

Yours truly,

W. B. LINSLEY."

Plaintiff's Exhibit 36 offered in evidence as follows:

"Menasha Paper Company.

MENASHA, WIS., May 9, 1908.

F. J. Zoelle, Agt., C. & N. W. Ry., Neenah, Wis.

DEAR SIR: Regarding the two attached letters from shippers of cedar at Perronville and Wooden Ware timber.

Altho we do not want the embargo raised in general, we would be willing to have you make arrangements to accommodate the parties in question providing the train despatcher is careful and does not give them more than a total of three cars daily. If the embargo was raised in general there would be such an immense amount of wood arrive within a very short time that similar conditions as existed last winter would be the result. The Escanaba Wooden Ware Company has about thirty cars to ship and
78 you will note by the other letter that this shipper will not bother us any.

Thanking you in advance for attending to this matter immediately, we remain,

Yours truly,

MENASHA PAPER COMPANY.
HARRY BALLOU."

Plaintiff's Exhibit No. 37, offered in evidence, as follows:

"Chicago & Northwestern Railway Co.

Office of Local Agent.

NEENAH, WIS., May 11, 1908.

Mr. E. D. Brigham, G. F. A. Chicago, Ill., E. N. 383, C. & N. W. Ry., Gen'l Freight Dept.

May 12, 1908.

DEAR SIR: Again referring to the matter of allowing parties to load cedar bolts and logs for the Menasha Paper Co., I beg to call your attention to the attached letters from M. Perron and the Escanaba Woodenware Co., requesting the Menasha Paper Co. to take the matter up and have their cars released.

The Menasha Paper Co. now advise that they can take cars three cars per day, which would be eighteen cars per week. It being understood that they will not accept timber from any other shippers.

Kindly give this matter your attention.

Yours truly,

F. J. ZOELLE, *Agent.*"

79 "MENASHA, WIS., May 14, 1908.

Escanaba Woodenware Co., Escanaba, Mich.

DEAR SIRS: Referring to yours of the 13th with reference to the Watersmeet wood. Would it be possible for you to wait until your other 30 cars are taken care of before you commence at Watersmeet? We can take on cedar only about as fast as we can use it direct in the mill, and therefore, do not like to take in too much of a bunch at once, and become blocked again.

Also, please advise about how many cars you could get along with per week at Watersmeet points.

Yours truly,

MENASHA PAPER CO."

"Escanaba Woodenware Company.

ESCANABA, MICH., May 7, 1908.

M. H. Ballou, Mgr., Menasha Paper Company, Menasha, Wis.

DEAR SIR: In conversation with the Chief Train Despatcher of the C. & N. W., he advised me that he will be unable to furnish me any cars to load bolts and logs under the Escanaba Woodenware Company's contract with you, unless you instruct the agent at Neenah to advise Mr. Brigham that you are willing to waive the blockade order in as far as shipments from this company are concerned. I would, therefore, ask that you give this matter your immediate attention and receive the material as you promised in our conversation over the telephone this afternoon. I have made

80 contracts for loading this material, and it will mean a very serious loss if cars are not furnished promptly.

Yours truly,

H. W. READE, *Receiver.*"

Plaintiff's Exhibit No. 38, offered in evidence, as follows:

"Menasha Paper Company.

MENASHA, WIS., May 16, 1908.

Mr. F. J. Zoelle, Agt., C. & N. W., Neenah, Wis.

DEAR SIR: With reference to the attached regarding Watersmeet cars and which is explanatory. It will be satisfactory if you will handle about twenty empties in Watersmeet territory for these people to load cedar and ship to us at Menasha.

Yours truly,

MENASHA PAPER COMPANY.
HARRY BALLOU."

"Menasha Paper Company.

MENASHA, WIS., May 22, 1908.

F. J. Zoelle, Agt. C. & N. W. Ry., Neenah, Wis.

DEAR SIR: We wish you would make immediate arrangements to furnish F. G. Hood and Company of Pentoga with 2 cars per day until further advised for cedar shingles timber to be shipped to ourselves at Menasha. Please be careful to not exceed the num-
81 ber per day that we ask for, as we have made arrangements to take care of two cars daily.

Thanking you, we remain,

Yours truly,

MENASHA PAPER COMPANY.
HARRY BALLOU."

H. R. WILLIAMS, recalled, testified as to the accounts and the exhibit attached to the complaint.

In case the consignee has more cars than the railroad company can place on a private track, then on such cars held short of private track, demurrage is charged to said man after the date of arrival.

Q. Will you refer to the rule that authorizes the imposition of such a charge?

Objected to as immaterial. Overruled. Exception.

A. Rule 5, section "B" and Section "C." Section "C" is the one I would apply there, and Rule 5.

The Consignments on which demurrage was charged were bolts and logs.

Q. What would be a through consignment?

Objected to. Overruled. Exception.

A. Well, it would be according to the billing, if it was billed through or rebilled.

Q. If it was billed from the point of origin to the point of desti-

nation without any intermediate orders, it would be a through consignment, would it not?

A. It would be a through consignment, yes, sir.

Objected to. Overruled. Exception.

82 Q. In other words, all shipments from one point in the state to another point of the state, where it is not billed to the order of somebody, or held for milling or shelling or something of that kind at some intermediate point, or at some point beyond, it would be called a through consignment?

Objected to. Overruled. Exception.

A. I would call it a through consignment, yes.

HARRY BALLOU testified on behalf of defendant, as follows:

I live at Ladysmith, Wis., am local manager of the Menasha Paper Co. In 1908 was located at Menasha, Wisconsin, with the same company as purchasing agent and manager of the shingle department of the Menasha Paper Co. During the year 1908 and up to and including June and July I had difficulty with the Chicago & Northwestern Railroad Company with regard to the switching facilities they were giving me.

I made a complaint to the agent, F. J. Zoelle. I made such complaint during the whole season. I also made written complaint. I made objections to the switching service to the agent with reference to the period beginning with April and ending with July, 1908. I objected to paying car service because the switching service was poor.

The railroad company gave the Menasha Paper Co. one or two switches a day during the months of June and July, 1908. There were times when there were empties on the switch on the
83 side-track and no other cars were brought in to take their place.

Q. Had such empties been removed and new cars brought in, did you have the facilities in the way of labor and storage room to unload additional cars?

Objected to as immaterial and not the proper test. Objection overruled. Exception.

A. Yes.

Q. Were any cars that were delivered to your siding in June and July, 1908, held over the period of 48 hours allowed as free time by the car service rules?

Objected to as immaterial. Overruled. Exception.

A. No, sir. They were all unloaded so far as our records show, during the 48 hours free time allowed. I know of my own knowledge without the records.

It generally took from one to ten hours to unload the cars that were placed on our siding. That siding would accommodate about 7 cars. I did not give any orders to the C. & N. W. R. R. Co., its agents or

employes, to anyone connected with it, to hold our cars at Menasha or Snell's Siding.

One of our office men received the notification over the phone of the arrival of the car.

The empties would lay on the side-track after being unloaded during June and July, 1908, up to fifteen hours. There were times during that period of time, June and July, 1908, when there were neither empties nor full cars on the side-track.

84 Objected to. Overruled. Exception.

That condition would prevail for about ten hours, on an average of every few days.

Cross-examination:

I cannot state any definite time that I complained to Mr. Zoelle during June and July, 1908. During this time these complaints were made over the phone sometimes, and when I would happen to see him on the street or meet with him.

I complained to him on the street several times during that period. Probably twice a month. I would complain, give him the approximate length of time we were delayed, and he would generally state that the switch engines were busy and doing the best they could under the conditions.

I observed the conditions of this track serving our property every day and five or six times a day. That was part of my duty. We were using only about two-thirds of the track at this time for unloading. They could have spotted about 7 cars on the track at one time for unloading. We were partly unloading direct to the saw at this time.

Q. When you unloaded direct to the saw, could you spot more than four cars on this track?

A. Yes and no.

Q. Explain your answer.

A. It depended on how often we had received a switch.

Q. How often would you have to have a switch if you spotted 7 cars on this track, unloading direct to the saw?

85 A. Well, we could get along with one as far as it went.

Q. That is, you could unload one car and then you would have to have a switch engine come in and pull out the empties, is that right, and spot the second car?

A. Yes and no. There is a condition involved there.

Q. Please explain to me how you could unload more than one car direct to the saw without having a switch engine pull out the empty.

A. If there were no other cars west of the saw, we could drop the respective empties down. But if there were loads spotted west of the mill or the saw, for the purpose of unloading in our yards, it would require a switch more often than if we were not unloading in the yard.

Q. Can you state any instance during these two months of June and July, 1908, during which empties lay on this track up to fifteen hours?

A. Yes, sir.
Q. Will you do so, please?
A. Every day.
Q. Every day empties lay on that track up to 15 hours?
A. Yes.
Q. Without being pulled out?
A. Yes, sir.
Q. Have you any record of that?
A. Yes, sir.
Q. Where is it?
A. On that blue sheet there.

86 When empties lay there as long as that we would wait for the switch engine and take them out. I testified that we had one and two switches a day. A car that would be unloaded at 5 p. m. would not be taken out till the next forenoon. That is part of the 15 hours I refer to. We sometimes got night switches during the year 1908, between 7 and 9 in the evening. That was both for spotting loaded cars in and taking out loads. The ten hours I stated there was no cars on this track was in the day time. It varied from 7 o'clock till 6 in the evening. During those times there were times when we didn't get one switch a day, excluding Sundays and holidays.

Redirect examination:

During this period there were times when we were switched say three cars, and they were placed on the track, and no other cars were placed there. We could have unloaded at the saw and also at the yard at the same time. We did do that during the period in question, June and July, 1908. I did not give any orders to release the embargo that had been placed on shipments to our mill. I had charge of that at our mill.

I did not order the cars shown in Exhibits B and C, shipped to me during the months of June and July.

Objected to.

I know approximately when the embargo on wood destined to our mill was released by the railroad company. It was be-

87 ginning the latter part of May and the early part of June. Wood had come in prior to the month of June as fast as we could unload it.

Recross-examination:

I said that these cars on Exhibits B and C were sent us without orders. I did not refuse to accept them on their arrival. I did not refuse to accept them because they were not ordered.

On rebuttal the plaintiff offered the following testimony:

Rebuttal.

J. O. KLAPP, recalled, testified as follows:

This is Western Classification No. 44. That was in force in June and July, 1908.

Q. Does that show the classification of logs and the classification of bolts?

A. Yes, sir.

Objected to as immaterial.

Plaintiff's Counsel: I want to show that bolts and logs moved on different classifications and they are treated differently, and they are treated differently in the complaint, and in the schedules attached.

Referee: I will take the testimony.

Exception.

Defendant's Counsel: I will also interpose an objection for this reason: that the classification only applies to class rates.

88 There may have been and there probably was, and I think there was commodities rates on logs and bolts on which these shipments in question moved. In other words, the classification only governs the regular class rates.

Q. Will you turn to the pages and read to the clerk?

A. Page 81 reads, "logs N. O. S.," meaning not otherwise specified, "including walnut logs," "take lumber tariff rates." Page 82, item 32, as follows: "Wood bolts for staves, shingles or excelsior, class E." (Received and marked Plaintiff's Exhibit 40.)

F. J. ZOELLE, recalled.

Am familiar with the property about which some testimony has been taken, known as the John Strange property. Am also familiar with the tracks that serve that property. The Northwestern serves it at the front of the building, and the Chicago, Milwaukee & St. Paul at the back of the building. Right in front of the building there is a driveway and the Northwestern track is between the building and driveway, close to the building. I think Harry Ballou made requests of me for additional switching during January, 1908, the winter months. He did not make any such requests during June and July, 1908, that I remember of.

Had he made them, I think I would now remember it. The track serving the Menasha Paper Co. is outside the right-of-way of the Chicago & Northwestern.

89 Cross-examination:

By right of way I mean the land adjacent to their main line and auxiliary side-tracks. By my answer I mean that the track leading to the Menasha Paper Co. is not on our regular 66-foot right of way; nor is it any part of the yards. I don't know who owns that track. I know that the Chicago & Northwestern has been repairing it during

the time that I have known it. At the extreme south end there was a small machine shop, and if my memory serves me right they received perhaps a half dozen cars a year on that track. We served another industry besides the Menasha Paper Co. on that track while I was there.

We spotted, I should say, about six cars a year for this foundry or machine shop on that track.

JOHN RYAN, recalled by plaintiff:

I am familiar with the property known as the John Strange property of which Mr. Ballou testified. We put coal in the front of their mill. It holds two cars and the St. Paul track serves them for the rest.

(Referring to plat offered in evidence.) That is known as the Menasha Woodenware front track, and runs clear to the bridge.

Q. Suppose we mark that at each end with B and C. (Marked as indicated.)

Witness: This is the Menasha Paper Co., and this is known as the little foundry. There is a vacant lot in here between the St. Paul and Northwestern. Here is our transfer to the St. Paul. We
90 have to pull by and go in on the St. Paul and deliver cars down here to the St. Paul transfer.

Q. Then you go from B up to D and then down to E?

A. To deliver cars to the St. Paul transfer. This is the John Strange property right here. * * * There is no chance for to spot a car between that bridge and Strange's unloading coal point——

Q. I will mark the bridge "F," and Strange's unloading coal point "G."

A. Without interfering with traffic. Here is the property that Mr. Ballou wished to unload cars at. (Referring to the property marked "A.") This is John Strange receiving track for his paper mill.

Q. By that you refer to track marked E H, do you?

A. That is John Strange's receiving track for his pulp and paper stock to his paper mill. That is on the St. Paul road.

Q. Were you ever requested by Harry Ballou, during June and July, 1908, to give him more switching.

A. Invariably; often requested.

Q. What did you do when you received those requests?

A. Done it just as quick as possible; within an hour or two hours. Those requests were always complied with within an hour or two. Had they not been they would have been looking for a new yard master, I guess. I gave the Menasha Paper Company, during
91 June and July, 1908, on an average of two switches a day.

Q. Did you ever see the Menasha Paper Company track at any time during that time when there were no cars on it for a period of ten hours?

A. Not to my knowledge.

Q. It was your duty to observe conditions in the yard and that track?

A. Yes, sir.

Q. And had that condition happened, would you have known about it and remembered it?

Objected to as asking for a conclusion. Overruled. Exception.

A. Yes, sir.

Cross-examination:

There were not always seven cars on that track. There were not always seven full cars on that track either. When I delivered paper stock and stuff of that kind to the Strange mill, I did not take it down from the St. Paul siding that is marked here "H." Cars that came in on the Northwestern for delivery to the Strange mill were ordered on the St. Paul transfer.

Q. You did have them on the St. Paul transfer and come down through this part of the yard here?

A. There was our jurisdiction. Just that street there. Shoved the cars around in there. (Indicating.)

Mr. Quarles: I have marked that with the letter "I."

Q. In other words, on freight coming in on the Chicago &
92 Northwestern Railroad, when you made delivery to the Strange paper mill, you would make delivery on the St. Paul track and back of the premises here between E and H?

A. If the Strange Paper Company ordered them to the St. Paul.

Q. Was there any charge by the St. Paul for that?

Objected to as immaterial. Overruled. Exception.

A. Not that I know of. I did the switching.

Q. All you did was to use that switch track between E and H?

A. I did not use that switch track, you understand. This is what they called their main line. I did not use that switch track.

Q. You put your cars on that switch track, didn't you?

A. No, sir, I left them right on this main line.

Q. Just left them there?

A. That was considered our transfer. They have no transfer. I could go down on the St. Paul to about "J," without permission from the St. Paul.

Q. If you had a car consigned to the machine-shop mill, you would put it on the same track that you did the Menasha Paper Company cars, would you not?

A. Not always.

Q. Where would you put it?

A. Invariably, we would put them right up in front of his
93 mill on our main switch.

Q. You would have to come over that switch track and get on the main line?

A. That is the end of the track. Yes, they would have to go over it.

Q. The car would lay there on your main line until they had unloaded it?

A. They generally got a car of pig iron once a year.

Q. But the car would lie on your main line until it was unloaded?
A. It would lay there until we disturbed it.
Q. How could you go up and down your main line then?
A. Couple onto it and shove it along, fetch it back and spot it again.
Q. Every time you went by there?
A. Yes, sir. That was our practice. At times we spotted cars for that machine shop or foundry on the side-track that was used for the Menasha Paper Company. I couldn't state what times it was. I couldn't swear that there were not times, during June and July, 1908, that I had to take my engine to Fond du Lac or to the repair shop, and that there were whole days that I didn't do any switching at all. I could'nt state whether or not, during that period of time, I went to Appleton Junction to help out some engines that were broken down there. I wouldn't swear that I didn't. The records would show. I do not know of a car of shingle timber being spotted at the John Strange mill during that time.

94 Q. Did you ever spot anything for the John Strange mill, any cars?

A. Yes, sir. I spotted them on his front track—in front of the mill. The length of this track from "F" to the end of the track is three cars. Street car crossing over. I refer now to the Northwestern track. So if there were two cars on that, I could still spot one near "F" on the bridge. "F" is right on the bridge. There is a street right off the bridge. I wouldn't say what the distance is from the bridge to the end of the track—about 90 feet, I guess.
Q. Isn't it over 125 feet?
A. I never measured it.
Q. How long are your cars?
A. 30 or 35 feet.

Plaintiff offered in evidence the decision of the Interstate Commerce Commission, No. 2966, in the case of Brooklyn Cooperage Co. vs. Illinois Central Railway Company, et al., as reported in Volume 22, Interstate Commerce Commission reports, on pages 358-9.

Also memorandum of opinion in the case of Wright Carriage Body Co. vs. C. B. & Q. R. R. Co., No. 4478, reported in Vol. 26, I. C. C. R. 720 (Plf's. Ex. 41).

Also case No. 3770, Crescent Coal & Mining Co. vs. B. & O. R. R. Co., 23 I. C. C. R. 81 and 83.

Also Conference Rulings, Interstate Commerce Commission ruling No. 79, effective July 2nd, 1908, headed "Private Side Tracks." Reported on page 21 of the Conference Rulings.

95 (Marked Plf's. Ex. 42, and reads as follows):

"79. 'Private side-tracks' and 'private cars,' defined: (A) A private side-track, as this expression is used in the opinion, In the Matter of Demurrage Charges on Privately Owned Tank Cars, is one which is not owned by the railroad, is outside the carrier's right of way, yards, or terminals, and to which the railroad has no right of use superior to the right of the shipper. This definition is based, as we think it should be based, upon consideration of the carrier's right to the use of the track rather than the ownership of the land or rails."

HARRY BALLOU recalled for further cross-examination.
Testified as to exhibits.

Hearing adjourned to September 10, 1913.

Hearing resumed September 10, 1913.

ED. C. SENSENBRENNER testified for plaintiff as follows: Was clerk for defendant in June and July, 1908.

Testified as to the making of Exhibits 2 to 21 for identification.

The Northwestern would notify us of arrival of cars by telephone. There are a few of us in the office, but I generally answered the phone. They would ring up and they would say, "Here are some cars," and we would take that down, and they would say, "Car so and so and containing logs or bolts," and from whom they were shipped, and then they would say, "That is all." I would
96 say, "Much obliged," and we would hang up. That was generally the course of the conversation.

Memorandum No. 43 offered in evidence. (Showing cars received during the months of June and July.)

Memorandum No. 44 offered in evidence, showing cars referred to in defendant's exhibits, placed in chronological order.

Memorandum No. 45 offered in evidence and admitted, showing number of cars on hand, received and unloaded for the period in question.

The wood that was received during the months of June and July, 1908, was used for the manufacture of shingles. I always thought a bolt was anything under 8 feet and a log anything over 8 feet. There is no distinction between the kinds of wood that I know of. We used the bolts and the logs for the same purpose—for the manufacture of shingles.

Rule 4 of Utah Car Service rules offered in evidence as Exhibit 46 for defendant.

Rule 8 of Utah Car Service Association offered as defendant's Exhibit 47.

Rule 4. Car Service Charges.

"At the expiration of the free time a charge of One Dollar ($1.00) per car per day, or fraction thereof, must be collected for detention to all cars held for loading or unloading, or subject to order of consignors, consignees or their agents. (See Special Rules applicable to Tonopah & Goldfield Railroad.)

97 Rule 8. Cars detained for Various Causes.

Section 1. Cars detained at any point within the territory of this Association by reason of being billed to order and awaiting bills of lading or instructions, as to disposition and cars detained for want of proper shipping instructions, or for any cause for which shipper or consignee and not the Railroad Company is responsible, shall be subject to charges under these rules.

Sec. 2. When there is a dispute in regard to freight charges, and cars are held or refused on that account, or where car is reweighed at shipper's or consignee's request, regular Car Service charges must

be assessed and collected, provided that no correction in freight charges or weight is made.

Sec. 3. Cars detained by reason of being improperly or insecurely loaded shall be subject to Car Service charges under these rules.

Sec. 4. When cars are detained at shipping point by shipper or consignee or stopped in transit for them or ordered from one destination to another, and Car Service charges cannot otherwise be collected before forwarding, agents must enter amounts upon bills of lading and way-bills as advance charges."

Defendant offers decision in "Monroe & Sons vs. Michigan Central Railway, Opinion 1037, Interstate Commerce Commission reports, 27.

U. S. vs. D. & R. G. Ry. Co., 18 I. C. C. 7.

Rule 23 in Conference Bulletin 4 of the Interstate Commerce Commission was offered in evidence, paragraph (*c*), reading as follows:

(*c*) Demurrage rules and charges must be observed as strictly as transportation rules and charges. The commission cannot,
98 therefor, recognize as lawful any rule governing demurrage, the application of which is dependant upon the judgment or discretion of some person, or which provides for exemption therefrom in certain exigencies in *which* the creation of which the carrier has no part. Interstate tariff containing such rules must be corrected or cancelled."

Also the decision in the following cases decided by the Interstate Commerce Commission:

Peale, Peacock & Kerr vs. C. R. R. Co., 18 I. C. C. 25.
Porter, et al. vs. Ry. 15 I. C. C. 1.
Colorado Fuel & Iron Co. vs. So. Pac. Ry., 6 I. C. C. 488.
Newton Grain Co. vs. Ry., 16 I. C. C. 341.
Ohio Railroad Commissioner's Report for 1907, p. 15.

Conf. Ruling 242, Bulletin 5, page 79, Interstate Commerce Commission, reading as follows:

"242. Uniform Demurrage Rules and Practices.—Recognizing the great benefits to be derived from uniformity of car service rules, the commission endorses the code, which was reported to the National Association of Railway Commissioners and by that association recommended to the state and interstate commissions, it being understood that this action is, of course, subject to the right of the commission to inquire into the legality or reasonableness of any rule or rules which may be subject of complaint, and that an-
99 nouncement to that effect be made with the Code of Demurrage rules.

"In view of the exhaustive investigation, upon which the Demurrage Code is based, it is to be understood as controlling in cases where any conference ruling previously made conflicts with any of its provisions."

Also Rule, 5, Universal Demurrage Code.

Also Cudahy Packing Co. vs. Ry. 12 I. C. C. 446.

J. O. KLAPP, called by the defendant, testified as follows:

Q. Isn't it a fact that the wording in exceptions to Rule 1, "through consignments, when not held for orders," was a mistake and was corrected by yourself as car service manager by the promulgation of new rules shortly after the month of August, 1908?

Objected to as calling for a conclusion and attempting to vary the terms of a written instrument.

Referee: I don't see how that is proper. We have got to construe those rules as they were used at the time in question.

Objection sustained.

Exception.

Defendant rests.

Mr. Quarles then offered the following from the deposition of Harry Ballou under Section 4096, Wisconsin Statutes:

I have no definite recollection of the capacity of the piling ground. We piled bolts to the top of a telephone pole thirty
100 feet high. At that time the yard was not filled to capacity. My recollection now is better than it was. At that time 50 to 60 per cent of it was filled during June and July, 1908, 40 to 50 per cent being open and available for piling. I am sure of what I am testifying. Part of the open ground is on the side toward the track and there was a space there on which wood could be piled.

The property was about 500 feet square and I was on it every day.

I wrote the letter dated January 9, 1909, which reads as follows:

MENASHA, WIS., Jan. 9, 1909.

Mr. R. H. Aishton, General Manager, C. & N. W., Chicago.

DEAR SIR: The Wisconsin Demurrage Bureau have car service against us for cedar shingle timber received last Winter and Spring and which car service was caused by a physical impossibility on our part to unload within the specified time.

You probably recall your personal visit to our office the latter part of last winter in which you took up with us the matter of cedar shipments then arriving so fast as to cause a so-called blockade. You will also remember that we were doing all in our power to stop these shipments and were also doing all that we could to unload as fast as possible, by running our shingle mill night and day, and by piling the material in our yards and had also filled up private grounds alongside your tracks near your passenger depot, and that about the time you called all of these yards had
101 become filled to their limit and that it was becoming a physical impossibility to unload any more and that we were about to that point where only the daily requirements of the mill was being used to unload.

You no doubt appreciated the conditions and at that time offered to do anything in your power to relieve us of this rush of cars and suggested that you place an embargo on all cedar for us. We

quickly accepted this practical suggestion and the conversation was such that it practically meant that you were to take charge and that everything was to be out of our hands so far as this embargo was concerned. As a result, the embargo was strictly enforced, and shippers began to write us stating that agents along the line would not furnish empties and asked us to aid them, and we replied that we could not and would not, for reasons already known. We were experiencing a condition in which we felt safe that no more cars were to be received and in fact there were no shipments arriving. It was readily seen that the matter was taken out of our hands and indirect assurances given that no cedar would be shipped until we either were in a position to promptly unload or until such time as we asked for the cancelling of embargo instructions.

However, later on, and without warning from any point, cars began to move and with such a rush that car service accumulated because our yards had then filled up and we were unloading only as required at the mill.

We have refused to pay this car service because we feel that we are in no manner responsible for reasons above stated and Mr. Klapp has requested us to write you along the lines we have stated to him and we both appreciate hearing from you either
102 denying or affirming the statements and claims made in this letter to you.

Yours truly,

MENASHA PAPER COMPANY,
HARRY BALLOU."

Objected to and received.

Q. In your letter of September 11th, 1908, you state at the bottom of page 2, "our facilities at that time were such as to unload three cars daily. It was a physical impossibility then to unload in the yards." Is that statement correct?

A. My recollection now is that we had room in the yards.

Q. And that the statement in that letter is erroneous?

A. I don't know.

Q. Well, which one is true?

Objected to as a question of argument.

A. My recollection has not changed any from what I testified to the effect that I think there was room in the yards.

Q. And that it was not a physical impossibility to unload in the yards?

A. No.

Q. Do you think your recollection today is better than a letter written within three or four months after the incident?

A. It would depend on circumstances.

Q. Well, with reference to this particular fact?

A. I might have some object in writing a letter that way.

103 Q. If you had an object would you have misstated the facts?

A. I don't know.

Q. You might?

A. I don't know.

Q. Am I to infer from that that you might have misstated the facts if you had such an object in view?

A. I don't know how you would infer it. That is for you to infer.

Q. Your answer is open to that inference, Mr. Ballou. I want to know whether I am permitted to infer that from your answer.

A. I don't know just the meaning of the question.

Q. You stated that you might have had an object in stating the facts as you have stated them in that letter, and I asked you if you had an object would you have misstated the facts?

Defendant's Counsel: As to what he would have done is objected to.

A. I don' know whether I told the truth in the letter or not.

Q. If you had an object in view would you have misstated the facts knowingly in that letter?

A. I don't know whether I would or not.

Q. But you might?

A. I would't say whether I would or would not.

Q. Is it your custom to misstate facts where you have an object in view?

104 A. No, sir.

The notices of arrival were given over the telephone. That had been the custom for some years previous.

Nothing was said at the conference as to how long the embargo should continue in force. There was nothing said as to when it would be raised.

And no promise was made or nothing said about giving us notice when it was raised. The conversation I have just referred to was the only conversation we ever had with the officers of plaintiff railroad about embargoes except when they asked us later to pay car service.

I never requested cars to be spotted for unloading other than on this siding. No one did on behalf of our company and if they did I would have known it.

O. D. Hollis, sworn on behalf of plaintiff, testified as follows:

Testified as to the correctness of Exhibits B and C to plaintiff's complaint.

C. S. Evenson, being recalled by plaintiff, testified:

Produced and proved plaintiff's record book of freight received, duplicate original of expense and freight bills, expense bills and receipts thereof.

Plaintiff rests.

Testimony closed.

Plaintiff's Requests to Find.

(Title of Cause.)

To the Honorable John F. Harper, Referee:

105 Now comes the above entitled plaintiff and requests this Honorable Court to find as follows:

Findings of Fact.

1. That the schedules attached to the complaint, Exhibit A, were tariffs for computing demurrage charges, duly prepared, printed, posted and filed with the Railroad Commission of Wisconsin and the Interstate Commerce Commission (pp. 1 and 2).

2. That the defendant during the times in question, maintained and operated for the purposes of unloading the cars delivered by the plaintiff, a private side-track, which connected with the tracks of the plaintiff (pp. 52, 190, 194).

3. That the Court amend its fourth finding of fact so that the exhibits referred to therein read "Exhibit C" in place of "Exhibit B."

4. That no request or demand was ever made by order to spot cars or otherwise that plaintiff spot cars for unloading on any public delivery track or any place other than defendant's said private side-track, and that defendant would have been at all times unable to unload said cars had they been so spotted.

5. That the embargo against bolts was applied by the plaintiff solely because of the request of the defendant, but "not by reason of any conditions on plaintiff's line necessitating its application," and that it was partially raised from time to time as and when defendant requested it (pp. 136, 173, 218).

106 6. That there was never any agreement between the plaintiff and defendant for plaintiff to notify defendant of the raising of the said embargo, and that defendant was not entitled to notice by reason thereof (p. 223).

7. That there was no agreement to keep said embargo order in force for any specific length of time. Plaintiff was at liberty to raise it at any time (p. 223).

8. That in July, 1908, and again in September, 1911, plaintiff duly demanded of defendant payment of the demurrage set forth in the complaint; that defendant refused and assigned as its sole ground for refusing to pay, the existence of the said embargo order (pp. 96, 97).

9. That finding No. 11 be amended by changing the word "lots" in the eighth line thereof to "logs," and inserting after the word "cars" in the ninth line thereof the words "of bolts."

10. That none of the cars on which demurrage accrued were through consignments not held for orders.

11. That each and every of the cars in question was held at destination on account of congestion of defendant's private side-

track, due to its inability to unload and awaiting orders from defendant.

12. That the demurrage sued for accrued at destination.

You are further requested to find as conclusions of law the following:

107 *Conclusions of Law.*

1. That defendant is estopped from urging any defense other than the existence of the said embargo.

2. That the defendant was not entitled to notice of the raising of said embargo by plaintiff.

Respectfully submitted,

LINES, SPOONER, ELLIS & QUARLES,
Attorneys for Plaintiff.

Decision of Referee.

(Title of Cause.)

I am of the opinion that the station demurrage book, Plaintiff's Exhibit 27, is admissible in evidence. It was made by the witness Thompson from personal knowledge, to some extent at least, and I believe, on the whole, sufficiently established by his evidence (testimony, pp. 3-21). It is unfortunate that the order book is lost (48), which contained memoranda of some of the orders for placing cars given by defendant, but I cannot, because of this misfortune, refuse to admit the evidence of this demurrage book, into which such orders were copied. Mr. Ryan, the yardmaster, and Mr. Evenson, cashier of plaintiff at Menasha, without being able to substantiate the detail contained in this book, in a general way corroborate its contents.

Defendant's car record, entitled "record of shingle timber received," Exhibits 2 to 21, I believe, is, with the sheets from which it is made, Exhibit 42, though they are only identified by the maker's handwriting, also admissible in evidence. The evidence of
108 Mr. Ballou and Mr. Sensenbrenner sufficiently identifies them (196-202), within the requirements of our statute.

In considering the comparative weight of the evidence furnished by plaintiff's and defendant's books, it is to be noted at the outset, that defendant offers no evidence as to the five cars listed in Exhibit B of the complaint, nor as to about twelve of the cars listed in Plaintiff's Exhibit C.

Defendant's car record is in the form of loose sheets, which, it is objected, cannot properly be called "entries in a book or other permanent form," as required by Wis. Stat., section 4189. This objection does not seem to me well taken. The leaves offered, comprise all the leaves, from a period commencing before, and extending after, the period here in controversy (177), and I believe the entries thereon, if not in a book, are in "permanent form"; that is, were made with intent to be permanently preserved, which to my mind is the test

intended by the statute, rather than that they should be fastened together by a permanent binding.

As to the same cars, there is no conflict in the dates of arrival, as shown by plaintiff's and defendant's exhibits, but there is a serious conflict as to the dates upon which the cars in question were ordered placed by the defendant, were placed and were unloaded or released by the defendant. A comparison between Plaintiff's Exhibit C, attached to the complaint, which is made from the plaintiff's station demurrage book, and defendant's Memorandum, No. 43, a
109 compilation from its books, shows a hopeless conflict upon these points, which is typically illustrated by the first three cars in question, all of which arrived June 12th:

Car No.	Plaintiff's date of placing.	Defendant's date of placing.	Plaintiff's date of unloading.	Defendant's date of unloading.
32577	July 12	June 19	July 13	June 20
727	July 12	June 19	July 13	June 22
50085	July 13	June 19	July 13	June 20

Perhaps some explanation of these discrepancies is found in the fact that the defendant's Shingle boss, who was not called as a witness, may have used the terms "placed for unloading" and "unloaded" in a different sense from that which the railroad has used the corresponding terms "Placed" and "Released," but this would only partially explain the difference.

Compelled to a choice between this conflicting evidence, I feel that the plaintiff's is, on the whole, the stronger, being better established by personal knowledge, to some extent at least, of the witnesses, who identify its records, and of some other witnesses, generally. Defendant's records, on the other hand, so far as they go, are established only by the defendant's witness Sensenbrenner, who merely testifies to the truth of his entries of the shingle boss' record (defendant's Exhibit 42), which the witness states is in the shingle boss' handwriting (197).

It will therefore be found that all the cars, listed in the exhibits attached to the complaint, arrived, were ordered, were placed and released, as shown in those exhibits. There is no doubt that these cars did arrive in very large numbers on certain days. Ex-
110 hibits B and C, attached to the complaint, show the following arrivals:

June 12	6
June 13	28
June 15	8
June 16	10
June 20	2
June 24	1
June 26	4
June 27	1
June 31	1
July 2	8

July 3	6
July 7	1
July 9	1
July 21	1
July 23	2
July 24	3
Total	83

Defendant's sidetrack, on which the cars were unloaded, could accommodate seven cars (165), but had an actual capacity as used, of less, three to four, or possibly five, according to Mr. Ryan's estimate (54-55), which, I believe, is about right. It is, therefore, evident that defendant could not take care of these cars as they arrived, on some of these days, and they were therefore held by the plaintiff for various long periods, which gave rise to these demurrage charges.

I cannot see, however, that the capacity of defendant's sidetrack, from a legal standpoint, really has anything to do with plaintiff's right to recover demurrage. Except for the embargo agreement hereafter considered, it was the duty of defendant to receive the cars and unload them as they came, and if its sidetrack was not
111 sufficiently large to permit it to do this, it should have secured other accommodations, made other arrangements or admitted its liability to plaintiff's charges for holding the cars.

It is claimed, however, by the defendant in this case that plaintiff should not recover because plaintiff did not fill its sidetrack with cars. I do not find that the evidence supports this contention. I believe the facts in this regard to be that, as defendant used its sidetrack, more cars could not have been placed upon it and unloaded. It was practically impossible to unload seven cars on this track; impossible to unload more than three or four cars practically, and this or something less than this is what the defendant was doing during the period in question. Defendant's Memorandum No. 44 shows that during the period in question, it was unloading between two and three cars a day, and I believe that practically this was all it could do. I cannot find any delay on the part of the plaintiff in switching cars (58, 187) on defendant's side track, but even if these were, I do not believe that defendant could have taken care of any more cars than it received, or any faster than it actually received them.

The capacity of defendant's sidetrack, however, is again a question of comparatively little moment in this case, in respect to the number of cars delayed upon it as compared with other causes of delay. It appears from examination of the exhibits attached to the complaint, as well as defendant's Memorandum No. 43, com-
112 piled from its books, that the time occupied in unloading cars on the sidetrack is but a small part of the time for which demurrage is claimed. Both plaintiff's evidence and defendant's evidence show, although not in accord as to the length of time, that long intervals elapsed between the dates when cars arrived and when

they were placed for unloading, and the cause for this delay is the cause for much the largest part of the demurrage claimed.

It appears without contradiction that when cars arrived, the plaintiff notified the defendant of such arrivals by telephone, giving the car numbers (19, 34½, 35, 223). It is also testified, without contradiction, that then it was a general custom, with only occasional exceptions, for the plaintiff to hold the cars until defendant notified it to place them upon the sidetrack for unloading (34, 36, 52, 57). The evidence of plaintiff's witnesses and its books are sufficient to show when cars were thus ordered and placed while defendant has no specific evidence on either of these points, except the entries as to placing contained in the shingle boss' book. These, which are in hopeless conflict with plaintiff's corresponding entries, must have been made with some other definition of the term in mind than that used and properly used by the railroad.

The existence of the custom of notice by plaintiff to defendant, as just found, removed from this case all question of any duty on the part of plaintiff to fill the defendant's sidetrack without or-
113 ders, which otherwise might be found to exist, and which has been held decisive in other cases.

The cause of this delay in ordering cars placed, I believe and shall find was that defendant practically could not handle any more cars than it did and hence did not ask for them (51, 53, 54, 58, 61).

Defendant's failure to order the cars placed for unloading would ordinarily make it liable for the plaintiff's charges for holding them subject to the consignee's order. Does the so-called embargo agreement change the rule in this case?

The facts in regard to this embargo, as I shall find them, are as follows: That on March 14, 1908, the plaintiff, at the request of the defendant, notified its agents in Wisconsin and Michigan, "until further advised," to discontinue to furnish equipment to load with bolts for the defendant (134). This embargo was by its terms to last until further advice, or as plaintiff's agent testifies, until the end of the calendar year (132). It is to be noted, that the embargo relates to bolts only. Some subsequent letters between the parties during April and May (129, 134, 137, 141-144), show that it may have been understood by the defendant or by some of the shippers to relate to logs as well as bolts, but I do not find that the railroad company so understood it or modified the original notice in this respect, which I shall not therefore find so changed.

The subsequent letters just referred to, also show that to some extent, the embargo was modified, that is, that on the request of the defendant a certain limited number of cars from certain ship-
114 pers, the railroad was directed to forward, but at the rate of not more than two or three a day. The evidence is not quite as clear as it might be as to whether these cars were part of the cars for which plaintiff now claims demurrage, but I believe on the whole justifies the finding that they were not.

Immediately after the shipment of the cars just referred to, the embargo was "applied" again, as Mr. Zoelle, plaintiff's agent, testifies, or as can be seen from its terms would be the effect. In other

words, at the time here in question, it was the agreement between plaintiff and defendant not to ship any bolts to plaintiff. That this agreement was violated, the evidence is undisputed. Was it a valid agreement?

Section 1797-10, Wis. Stats., provides that railroads are to furnish cars to all persons who may apply therefor, and to use reasonable diligence in moving freight and making delivery thereof. I can see no escape from the conclusion that plaintiff's agreement in this case not to load bolts for or deliver them to defendant, is contrary to the terms of this statute. As to the few cars constituting intrastate shipments, the section just quoted clearly governs. As to cars engaged in interstate commerce, I am in some doubt, first, whether our state statute governs, and second, if it does not, whether the Federal law prescribes the same duties upon carriers, points which were not argued specifically. I believe on the whole, however, that the case of Chicago, etc., R. Co. v. Hardwick, 226 U. S., 426, cited by plaintiff, warrants me in concluding that the same rule
115 governs the interstate shipments that governs the intrastate.

Defendant complains, not so much of plaintiff's failure to keep its agreement not to load cars, as it does at the raising of the embargo without notice, resulting in bunching the cars, for which no demurrage should be charged, it claims, because the fault of the railroad company. I cannot find that the rules, annexed to the plaintiff's complaint as exhibits, authorize any allowance for bunching, although plaintiff has in fact made some such allowances. It is, however, quite clear, that the bunching here complained of, resulted only as a violation of the plaintiff's agreement not to load or deliver bolts, and as this agreement has been found to be illegal, the defendant can base no relief upon it.

It follows, therefore, that the so-called embargo agreement, which I find to be illegal, makes no change in the conclusions otherwise reached, and that plaintiff is entitled to recover the demurrage as set forth in its complaint.

I shall draw findings of fact and conclusions of law in accordance with this decision and submit them to counsel on both sides for further suggestions.

Dated, February 20th, 1914.

JOHN F. HARPER, *Referee.*

116 *Proposed Findings of Referee.*

(Title of Cause.)

To the Honorable Circuit Court of Winnebago County:

This action was referred to the undersigned as Referee by order of this Court, dated May 2nd, 1912, to hear, try and determine the whole issues in this cause.

I, John F. Harper, Referee so appointed, do respectfully report that after issuing and serving notice of hearing, the parties to said matter appeared at my office in the City of Milwaukee on the 2nd day

of September, 1913, and the proceedings then and thereafter had in this matter are set forth in the record of such proceedings, filed herewith.

Upon the testimony taken and other proceedings had, and after hearing arguments of counsel, I respectfully report the following findings of fact and conclusions of law:

Findings of Fact.

1. That the plaintiff was, at all times mentioned in the complaint, a railroad corporation, engaged in operating a railroad at Menasha, Wisconsin, and elsewhere, and that the defendant was at such times, also a corporation engaged in business at Menasha, Wisconsin, and having its place of business adjoining the railroad of the plaintiff.

2. That the defendant during the times in question, maintained and operated for the purpose of unloading the cars delivered
117 by the plaintiff, a sidetrack, which connected with the tracks of the plaintiff.

3. That on and between the 3rd day of June, 1908, and the 20th day of July, 1908, the plaintiff carried and delivered in interstate Commerce certain cars, containing pulp and wooden bolts, as more particularly set forth in Exhibit B, attached to the complaint; that the numbers of said cars, the dates and hours of their arrivals at Menasha, Wisconsin, the dates and hours when the same were ordered by the defendant placed upon its sidetrack, the dates and hours when they were respectively placed upon its sidetrack for unloading, and the dates and hours when they were respectively released, are all correctly set forth in Exhibit B, attached to the complaint.

4. That on and between the 6th day of June and the 24th day of June, 1912, the plaintiff carried and delivered in interstate commerce certain cars, containing logs and wooden bolts, as more particularly set forth in Exhibit B, attached to the complaint; that the numbers of said cars, the dates and hours of their arrivals at Menasha, Wisconsin, the dates and hours when the same were ordered by the defendant placed upon its sidetrack, the dates and hours when they were respectively placed upon its sidetrack for unloading, and the dates and hours when they were respectively released, are all correctly set forth in Exhibit B, attached to the complaint.

4*a*. That the defendant's sidetrack, from which the cars were unloaded by the defendant, could accommodate about seven
118 cars, but had an actual capacity, as used during the times in question, of three or four cars, or possibly five; that as defendant used the sidetrack, more cars could not have been placed upon it and unloaded than were actually placed upon it and unloaded there during the times in question, to-wit: about two or three cars a day.

5. That when each of the cars in question arrived, the plaintiff notified the defendant of each arrival by telephone, giving the car numbers, and, according to the general custom, with only occasional exceptions, the plaintiff held the cars until defendant notified it to place them upon the sidetrack for unloading.

6. That defendant did not order the cars placed for unloading sooner than as shown in Exhibits B and C attached to the complaint, because, practically, defendant could not handle any more cars than it did, and hence did not ask for them.

7. That there was no delay on the part of the plaintiff in switching the cars upon the sidetrack, or refusal or inability of the plaintiff to place the cars, nor any insufficiency of terminal facilities, nor any congestion in the yards of the plaintiff which prevented the placing of cars upon the sidetrack in question when ordered.

8. That the charges for demurrage in question should be computed according to the rules of the Wisconsin Car Service Association, shown as Exhibit A in plaintiff's complaint.

119 9. That there is due to the plaintiff from the defendant for demurrage upon the cars mentioned in Exhibit B attached to the complaint, the amounts therein set forth, aggregating $104.00, from which there should be allowed deductions, as set forth in said Exhibit B, computed according to the Car Service Rules, amounting to $70.00, leaving a net balance of $34.00 to the plaintiff under Exhibit B.

10. That there is due to the plaintiff from the defendant, for demurrage upon the cars mentioned in Exhibit C attached to the complaint, the amounts therein set forth, aggregating $1,419.00, from which there should be allowed deductions, as set forth in said Exhibit C, computed according to the Car Service Rules, amounting to $435.00, leaving a net balance of $984.00 to the plaintiff under Exhibit C.

11. That on March 14th, 1908, the plaintiff, at the request of the defendant, notified the plaintiff's agents in Wisconsin and Michigan "until further advised" to discontinue to furnish equipment to load with bolts for the defendant; that this arrangement, called an "embargo," did not run out until the close of the year 1908; that this "embargo" did not by its terms cover logs and was not thereafter modified by an agreement of the parties to cover lots; that in April and May, 1908, the said limited number of cars from certain shippers were forwarded by the plaintiff to the defendant upon defendant's request, but that such cars were not included among those set forth in Exhibits B and C, attached to the complaint; that

120 after shipment of these cars, the "embargo" was applied again, so that it was the agreement between the plaintiff and the defendant not to ship any bolts to plaintiff but this agreement was violated, and the cars mentioned in Exhibits B and C were shipped in violation thereof, and were shipped without notice from the plaintiff to the defendant of intention to ship the same, resulting in the arrival of cars in great numbers on certain days, as more particularly set forth in the exhibits attached to the complaint, and as a result of the violation of the embargo agreement as to bolts, hereinbefore found.

12. That demand was made for the payment of the sums hereinbefore found due, on the 20th day of July, 1908.

Conclusions of Law.

1. That plaintiff is entitled to recover of the defendant the sum of $34.00 for the demurrage set forth in Exhibit B, attached to its complaint, and the further sum of $984.00 for the demurrage set forth in Exhibit C, attached to its complaint, making in all a total of $1,018.00, together with interest thereon from July 20th, 1908.

2. That the embargo arrangement found in Finding 11, was and is illegal, contrary to public policy and void.

Dated, February 27, 1914.

Respectfully submitted,

JOHN F. HARPER, *Referee.*

121 *Plaintiff's Exceptions to Findings.*

(Title of Cause.)

To the Honorable John F. Harper, Referee:

Now comes the plaintiff above entitled and excepts to the findings of fact and conclusions of law of the referee as follows:

1. Excepts to so much of the seventeenth finding of fact as reads: "that after shipment of these cars, the 'embargo' was applied again so that it was the agreement between the plaintiff and the defendant not to ship any bolts to plaintiff, but this agreement was violated, and the cars mentioned in Exhibits B and C were shipped in violation thereof, and were shipped without notice from the plaintiff to the defendant of intention to ship the same, resulting in the arrival of cars in great numbers on certain days, as more particularly set forth in the exhibits attached to the complaint, and as a result of the violation of the embargo agreement as to bolts, hereinbefore found," and to the whole and every part thereof.

Respectfully submitted,

LINES, SPOONER, ELLIS & QUARLES,
Attorneys for Plaintiff.

Plaintiff's Exceptions to Refusal to Find.

(Title of Cause.)

To the Honorable John F. Harper, Referee:

Now comes the above entitled plaintiff and excepts to the refusal of the referee to find:

122 1. Plaintiff excepts to the refusal of the referee to find all of the fifth request to find excepting only the words "not by reason of any conditions on plaintiff's line necessitating its application."

2. Excepts to the refusal of the referee to find as requested in the sixth request to find and the whole and every part thereof.

3. Excepts to the refusal of the referee to find as requested in the seventh request to find and the whole and every part thereof.

4. Excepts to the refusal of the referee to find the first two lines of the ninth request to find.

5. Excepts to the refusal of the referee to find the second conclusion of law and the whole and every part thereof.

Respectfully submitted,

LINES, SPOONER, ELLIS & QUARLES,
Attorneys for Plaintiff.

Defendant's Exceptions to Findings.

March 11, 1914.

Hon. John F. Harper, c/o Harper & McMynn, 1033-37 Wells Bldg., Milwaukee, Wis.

DEAR SIR: I have received copy of your findings of fact in North Western Railroad Company vs. Menasha Paper Company and have delayed answering your letter as I expected to meet Mr. Quarles in Chicago on several occasions, but he was detained in some way or another. I have not been able to see him up to the present
123 time. As to your findings in paragraph 4A, I do not believe that this finding is definite enough. You state "that as defendant used the sidetrack, more cars could not have been placed upon it and unloaded than were actually placed upon it and unloared there during the times in question." As I remember the testimony, Mr. Ryan and others testified that *that* although the track could hold seven cars, only the number unloaded each day were placed thereon. Ryan's testimony also was to the effect that the track was never filled with cars, empty or loaded. I believe this is a very important matter, and would like to have your finding as explicit as possible on this point. In other words, I believe under the authorities one of the turning points in this case is whether or not more cars could have been placed on this side-track than were placed by the plaintiff company, regardless of whether or not said cars were unloaded by the defendant.

Finding No. 8 is general in its character. No effort has been made to contest the rules referred to therein. Our contention was that the rules did not apply to the instant case. I think it would also be well for your findings to show what particular rules applied. I might also state that I will contend that if the embargo in question was illegal and contrary to public policy and void, that the railroad company had no right to hold these cars and afterwards release the embargo and ship the cars in large quantities.

124–128 Of course, the findings being all against me, I naturally object to all of them, but the above specific objections are made for convenience in objecting to your report.

Very truly yours,

FELIX J. STREYCKMANS.

All above requests refused March 12/14.

JOHN F. HARPER, *Referee.*

Certificate of Circuit Judge Settling Bill of Exceptions.
Notice of Appeal.
Admission of service of Notice of Appeal.
Undertaking on Appeal.
Certificate of Clerk transmitting Record.

129 STATE OF WISCONSIN,
In Supreme Court:

And afterwards, to wit: on the 19th day of November, A. D. 1914, the same being the 20th day of said term, the following proceedings were had in said cause in this court:

Winnebago Circuit Court.

CHICAGO & NORTHWESTERN RAILWAY CO., Respondent,
vs.
MENASHA PAPER CO., Appellant.

And now at this day came the parties herein by their attorneys, and this cause having been argued by Louis Quarles, Esq., for the said Respondent, and by Felix J. Streychmans, Esq., for the said Appellant, and submitted, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

Filed Oct. 9, 1915. John H. Laabs, Clerk.

130 STATE OF WISCONSIN,
In Supreme Court:

And afterwards, to wit: on the 8th day of December, A. D. 1914, the same being the 23rd day of the said term, the judgment of this court was rendered in words and figures following, that is to say:

Winnebago Circuit Court.

CHICAGO & NORTHWESTERN RAILWAY CO., Respondent,
vs.
MENASHA PAPER CO., Appellant.

Opinion by Justice Kerwin.

This cause came on to be heard on appeal from the judgment of the Circuit Court of Winnebago County, and was argued by cousel. On consideration whereof; it is now here ordered and adjudged by this court, that the judgment of the Circuit Court of Winnebago County, in this cause, be and the same is hereby affirmed, with costs against the said Appellant, taxed at the sum of One hundred forty-one and 62/100 Dollars ($141.62).

131 Thereupon the opinion of the court by Justice Kerwin was filed in words and figures following, that is to say:

132 *Opinion of Court. Filed December 8th, A. D. 1914.*

133 In Supreme Court, State of Wisconsin.

No. 123.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Plaintiff and Respondent,

v.

MENASHA PAPER COMPANY, Defendant and Appellant.

This action was brought to recover for alleged demurrage charges on cars of logs and bolts shipped to appellant at Menasha, Wisconsin, in June and July, 1908. Two causes of action are set out in the complaint; the first for demurrage accruing on intrastate shipments, and the second for demurrage accruing on interstate shipments. The case was referred to John F. Harper, Esq., Referee, to hear, try and determine, who made the following Findings of Fact and Conclusions of Law:

Findings of Fact.

"1. That the plaintiff was, at all times mentioned in the complaint, a railroad corporation engaged in operating a railroad at Menasha, Wisconsin, and elsewhere, and that the defendant was at such times, also a corporation engaged in business at Menasha, Wisconsin, and having its place of business adjoining the railroad of the plaintiff.

134 "2. That the defendant during the times in question, maintained and operated for the purposes of unloading the cars delivered by the plaintiff, a private sidetrack, which connected with the tracks of the plaintiff.

"3. That on and between the 3rd day of June, 1908, and the 20th day of July, 1908, the plaintiff carried and delivered in intrastate commerce certain cars, containing pulp and wooden bolts and logs, as more particularly set forth in Exhibit B, attached to the complaint; that the numbers of said cars, the dates and hours of their arrival at Menasha, Wisconsin, the dates and hours when the same were ordered by the defendant placed upon its sidetrack, the dates and hours when they were respectively placed upon its sidetrack for unloading, and the dates and hours when they were respectively released, are all correctly set forth in Exhibit B attached to the complaint.

"4. That on and between the 6th day of June and the 24th day of June, 1912, the plaintiff carried and delivered in interstate commerce certain cars containing logs and wooden bolts, more particularly set forth in Exhibit C, attached to the complaint; that the

numbers of said cars, the dates and hours of their arrivals at Menasha, Wisconsin, the dates and hours when the same were ordered by the defendant placed upon its sidetrack, the dates and hours when they were respectively placed upon its sidetrack for unloading and the dates and hours when they were respectively released, are all correctly set forth in Exhibit C, attached to the complaint.

"5. That the defendant's sidetrack, from which the cars were unloaded by the defendant, could accommodate about seven cars, but had an actual capacity, as used during the times in question, of three or four cars, or possibly five; that as defendant used the sidetrack, more cars could not have been placed upon it
135 and unloaded than were actually placed upon it and unloaded there during the times in question, to-wit: about two or three cars a day.

"6. That each and every of the cars in question was held at destination on account of congestion of defendant's private sidetrack, due to its inability to unload and awaiting orders from defendant.

"7. That when each of the cars in question arrived the plaintiff notified the defendant of each arrival by telephone giving the car numbers, and, according to the general custom, with only occasional exceptions, the plaintiff held the cars until defendant notified it to place them upon the sidetrack for unloading.

"8. That defendant did not order the cars placed for unloading sooner than as shown in Exhibits B. and C., attached to the complaint, because, practically, defendant could not handle any more cars than it did, and hence did not ask for them.

"9. That no request or demand was ever made by order to spot cars or otherwise that plaintiff spot cars for unloading on any public delivery track or any place other than defendant's said private sidetrack, and that defendant would have been at all times unable to unload said cars had they been so spotted.

"10. That there was no delay on the part of the plaintiff in switching the cars upon the sidetrack, or refusal or inability of the plaintiff to place the cars, nor any insufficiency of terminal facilities, nor any congestion in the yards of the plaintiff which prevented the placing of cars upon the sidetrack in question when ordered.

"11. That the charges for demurrage in question should be computed according to the rules of the Wisconsin Car Service
136 Association, shown as Exhibit A in plaintiff's complaint.

"12. That the schedules attached to the complaint, Exhibit A, were tariffs for computing demurrage charges, duly prepared, printed, posted and filed with the Railroad Commission of Wisconsin and the Interstate Commerce Commission.

"13. That none of the cars on which demurrage accrued were through consignments not held for orders.

"14. That the demurrage sued for accrued at destination.

"15. That there is due to the plaintiff from the defendant for demurrage upon the cars mentioned in Exhibit B attached to the complaint, the amounts therein set forth, aggregating $104.00 from which there should be allowed deductions, as set forth in said Exhibit B, computed according to the Car Service Rules, amounting to

$70.00, leaving a new balance of $34.00 to the plaintiff under Exhibit B.

"16. That there is due to the plaintiff from the defendant for demurrage upon the cars mentioned in Exhibit C attached to the complaint, the amounts therein set forth, aggregating $1,419.00, from which there should be allowed deductions as set forth in said Exhibit C, computed according to the Car Service Rules, amounting to $435.00, leaving a new balance of $984.00 to the plaintiff under Exhibit C.

"17. That on March 14th, 1908, the plaintiff, at the request of the defendant, and not by reason of any conditions on its line necessitating such notice, notified the plaintiff's agents in Wisconsin and Michigan, 'until further advised' to discontinue to furnish equipment to load with bolts for the defendant; that this arrangement, called an 'embargo,' did not run out until the close of the
137 year 1908; that this 'embargo' did not by its terms cover logs and was not thereafter modified by an agreement of the parties to cover logs; that in April and May, 1908, the said limited number of cars from certain shippers were forwarded by the plaintiff to the defendant upon defendant's request but that such cars were not included among those set forth in Exhibits B and C, attached to the complaint; that after shipment of these cars, the 'embargo' was applied again, so that it was the agreement between the plaintiff and the defendant not to ship any bolts to plaintiff, but this agreement was violated, and the cars mentioned in Exhibits B and C were shipped in violation thereof, and were shipped without notice from the plaintiff to the defendant of intention to ship the same, resulting in the arrival of cars in great numbers on certain days, as more particularly set forth in the exhibits attached to the complaint, and as result of the violation of the embargo agreement as to bolts, hereinbefore found.

"18. That in July 20, 1908, and again in September, 1911, plaintiff duly demanded of defendant payment of the demurrage set forth in the complaint; that defendant refused and assigned as its sole ground for refusing to pay, the existence of the said embargo order.

Conclusions of Law.

"1. That plaintiff is entitled to recover of the defendant the sum of $34.00 for the demurrage set forth in Exhibit B attached to its complaint, and the further sum of $984.00 for the demurrage set forth in Exhibit C, attached to its complaint, making in all a total of $1,018.00, together with interest thereon from July 20th, 1908.

"2. That defendant is estopped from urging any defense
138 other than the existence of the said embargo.

"3. That the embargo arrangement found in Finding 17, was and is illegal, contrary to public policy, and void."

The report of the Referee was confirmed by the court and judgment entered accordingly for plaintiff, from which this appeal was taken.

139 KERWIN, *J.*: The findings of the learned Referee confirmed by the court and sustained by the evidence support the judgment. The appellant contends that section C, rule 5, hereafter quoted is controlling. Under this rule it is insisted that it was the duty of respondent to keep the track of appellant full and that it would accommodate seven cars, and that only three or four and never to exceed five cars were kept thereon, hence no demurrage could have been charged under the rule referred to. We are of opinion that the Referee properly construed the rule as applied to the facts in this case in holding that the track was full to its capacity when demurrage was charged. The rule must have a reasonable construction; and it appears from the evidence that while seven cars could be placed upon the track at one time, not to exceed five could be placed there so as to make its use for unloading practicable, and this situation was well understood by the parties and cars placed as required accordingly. So it is clear that the track was kept full within the meaning of the rule.

In the instant case the cars held and upon which demurrage was charged reached destination at Menasha and were held at Snells siding for convenience awaiting order, and the appellant ordered only so many cars as it could unload from day to day. It appears that the appellant did not order any more cars placed on its track than were placed thereon, but it is claimed that it was the duty of respondent to place and keep the track full with seven cars whether such condition interfered with unloading or not, and if the track was not kept full no demurrage could be charged.

The construction placed upon the rule by both parties, viz: that the track was full when the number of cars which could be handled there were upon it was the sensible and practical construc-
140 tion. The respondent was not obliged to do a vain and useless thing by putting seven cars upon the track at one time and thus prevent the practical handling or unloading of any cars thereon by appellant contrary to its orders. The Referee and court below found upon sufficient evidence that while the appellant's side track from which cars were unloaded could accommodate about seven cars it had an actual capacity as used during the time in question of only three or four cars, or possibly five; that as defendant used the side track more cars could not have been placed upon it and unloaded than were actually placed upon it and unloaded during the time in question, to-wit: about two or three cars a day.

Appellant complains of a so-called raising of an alleged embargo without notice. The court below and the referee held the embargo illegal, against public policy and void. It appears from the evidence that appellant demanded of respondent that it issue an embargo refusing to give to shippers cars for bolts consigned to appellant at Menasha and respondent did so. The order reads as follows: "On account of accumulation, you will, until further advised, discontinue to furnish equipment to load with bolts consigned to Menasha Paper Comapny. Please be governed accordingly." It is clear that the so-called embargo as laid and operated by direction of appellant granted special privileges and was contrary to law, therefore was

aised by the respondent so as to avoid liability for discrimination
s between shippers. Both the federal law and the state statutes pro-
ide against discrimination or special privileges; and the so-called
mbargo in question was in contravention of law. Chicago & A.
R. Co. v. Kirby, 225 U. S. 155; St. Louis I. M. & S. R. Co. v.
141 Edwards, 227 U. S. 265; Michie vv. New York N. H. & H. R.
Co., 151 Fed. 694; United States v. Philadelphia R. R. Co.,184
Fed. 543; Blinn Lumber Co. v. Southern Pacific R. Co.,18 I. C. R. R.
130; Armour P. Co. v. United States, 209 U. S. 56; Chicago R. I.
nd P. Co. v. Hardwick F. E. Co. 226 U. S. 426; Hepbourn Act of
June 29, 1906, 34 Stats. 584 c. 3591; Sections 1797-4, 1797-10,
1797-22, 1797-24 Wisconsin Stats.

It is claimed by appellant that because some of the cars after reaching destination at Menasha were carried beyond to the nearest side track and there held until the accumulation in the yards ceased, then moved back to Menasha, the cars were not held at destination, hence no demurrage could be charged and rests on United States v. Denver & R. G. R. R. Co., 18 I. C. C. R. 7 in support of this position. That case is not controlling here. An examination of it will show that the commission in treating the case found no rule similar to rules of the Respondent which control the instant case, copies of which are attached to the complaint, and the case relied upon by appellant is based upon a rule in force at the time the demurrage accrued, therefore governed the case. But afterwards provision was made for a case similar to the one before the Commission and which was in force when the case above referred to was tried, but not appliable because the demurrage accrued before such rule went into effect. In referring to this subject in United States v. Denver & R. G. R. R. Co., supra, the Commission said, p. 10 of 18 I. C. C. R.:

"If the provisions subsequently inserted and now appearing in defendant's tariff had been in force at the time demurrage
142 would have accrued on cars held at Thistle Junction by direction of complainant. We rest our decision of this case on the proposition that demurrage can be assessed only in accordance with tariff provisions, and that the Rules of the Utah Car Service Association in effect when these cars were delivered did not authorize the demurrage charges in question."

In the case at bar the cars reached destination and notice of their arrival was given by respondent and the cars were ther-after held awaiting orders. The rules in force at the time in question clearly cover the instant case and justify the demurrage charges on any theory of the case.

"Rule 4. Cars which are stopped in transit or held by orders of shippers or consignee for reconsignment to points beyond, for change of load, for amended instructions, for change in billing, milling, shelling, cleaning, etc., or on account of improper, unsafe or excessive loading, or for any other reason for which the shipper or consignee is responsible, shall be subject to Car Service charges after the expiration of forty-eight (48) hours from arrival at the point of

stoppage, and all Car Service must be collected, or billed as advances when cars go forward."

"Rule 5. * * *

Section B. Cars for unloading shall be considered placed when such cars are held awaiting orders from consignors or consignees, or for the payment of freight charges after the notice mailed or otherwise given, or for the surrender of bills of lading.

"Section C. The delivery of cars to private tracks shall be considered to have been made, either when such cars have been placed on the tracks designated, or, if such track or tracks be full, when
143 the road offering the cars would have made delivery had the condition of such tracks permitted.

* * * * * * *

Complaint is made by appellant that the so-called embargo was raised without notice to it, and that such raising caused the bunching of cars and the delay in unloading. The alleged embargo was placed at the request of the appellant. There was no agreement that notice should be given of its removal and no duty rested upon the respondent to do so.

By the Court: The judgment is affirmed.

144 And afterwards, to wit: on the 9th day of February, A. D. 1915, the same being the 8th day of said term, the following proceedings were had:

CHICAGO & NORTHWESTERN RAILWAY CO., Respondent,
vs.
MENASHA PAPER CO., Appellant.

The Court being now sufficiently advised of and concerning the motion of said Appellant for a re-hearing in this cause, it is now here ordered and adjudged by this Court, that said motion be and the same is hereby denied with Twenty-five Dollars ($25.00) costs and costs of motion.

145 STATE OF WISCONSIN,
Supreme Court:

I, Clarence Kellogg, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original entry of argument, judgment of court, and order denying motion for rehearing, together with opinion of Court by Justice Kerwin on file in my office in the above entitled cause, and that it is a correct transcript therefrom, and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Madison, the 2nd day of October A. D. 1905.

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG,
Clerk of the Supreme Court of Wisconsin.

[Endorsed:] State of Wisconsin, Supreme Court. Chicago & Northwestern Railway Company, Respondent, against Menasha Paper Company, Appellant. Certified Copy of entry of argument, judgment of Court, order denying motion of rehearing and opinion of Court by Justice Kerwin. Filed Oct. 9, 1915. John H. Laabs, clerk.

146 UNITED STATES OF AMERICA,
Circuit Court of Winnebago
County, Wisconsin, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

I hereby further certify that under the laws of the State of Wisconsin, the files and records of all proceedings in said State are returned to the Clerk of the trial court at the end of 60 days after final determination of said cause in said Supreme Court and that the record and proceedings in the within cause were so duly returned and filed with me as clerk of the circuit court of Winnebago County after final determination of said cause in said Supreme Court and that I am the lawful custodian of such records.

In Witness Whereof I hereunto subscribe my name, and affix the seal of said Circuit Court, in the City of Oshkosh this 14th day of October, A. D. 1915.

[Seal of Winnebago County Circuit Court, Wisconsin.]

JOHN H. LAABS,
Clerk of the Circuit Court of Winnebago County, Wisconsin.

147 In the Supreme Court of the United States, October Term, 1915.

No. 696.

MENASHA PAPER COMPANY
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY.

It is hereby stipulated, by and between counsel for the respective parties, that exhibits Nos. 46 and 47 of the plaintiff in error herein, which were mislaid at the time the original record herein was forwarded to the Clerk of this Honorable Court, shall be forwarded direct by the Clerk of the Supreme Court of the State of Wisconsin to the Clerk of this Honorable Court and should be incorporated in the printed record of the case, to be prepared by the Clerk, of this Honorable Court, said exhibits consisting of certified copies by the Interstate Commerce Commission of the Utah Car Service rules.

FELIX J. STREYCKMANS,
Attorneys for Plaintiff in Error.
LOUIS QUARLES,
Attorney for Defendant in Error.

Dated Feb. 3, 1916.

[Endorsed:] No. 696. Supreme Court of the United States, October Term, 1915. Menasha Paper Co. vs. Chicago & Northwestern Railway Company. Stipulation. Felix J. Streyckmans, Attorney at Law, 1016 Ashland Block, Chicago. Filed Feb. 7, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis.

148 Filed Mar. 20, 1914. John H. Laabs, clerk.

C.
vs.
M.

DEFENDANT'S EXHIBIT 46. JOHN F. HARPER, REFEREE.

Interstate Commerce Commission,
Washington.

I, Judson C. Clements, Chairman of the Interstate Commerce Commission, do hereby certify that the paper hereto attached contains a true and correct copy of Rule 4, page 4, of Utah Car Service Association Revised Rules and Regulations, I. C. C. No. 2, reading as taking effect August 28th, 1906, filed with the said Interstate Commerce Commission on August 30th, 1906.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 26th day of May A. D. 1911.

[Seal Interstate Commerce Commission, 1887.]

JUDSON C. CLEMENTS,
Chairman of the Interstate Commerce Commission.

149 Page 4:

* * * * * * *

RULE 4.

Car Service Charges.

At the expiration of the free time a charge of one dollar ($1.00) per car per day, or fraction thereof, must be collected for detention to all cars held for loading or unloading, or subject to order of consignors, consignees or their agents. (See Special Rules applicable to Tonopah & Goldfield Railroad.)

[Endorsed:] Filed Nov. 18, 1914. Clarence Kellogg, Clerk of Supreme Court, Wis.

150 Filed Mar. 20, 1914. John H. Laabs, clerk.

C.
vs.
M.

DEFENDANT'S EXHIBIT 47. JOHN F. HARPER, REFEREE.

Filed Nov. 18, 1914. Clarence Kellogg, Clerk of Supreme Court, Wis.

Interstate Commerce Commission,
Washington.

I, Judson C. Clements, Chairman of the Interstate Commerce Commission, do hereby certify that the paper hereto attached contains a true and correct copy of Rule 8, pages 6 and 7, of Utah Car Service Association Revised Rules and Regulations, I. C. C. No. 2, reading as taking effect August 28th, 1906, filed with the said Interstate Commerce Commission on August 30th, 1906.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 27th day of May, A. D. 1911.

[Seal Interstate Commerce Commission, 1887.]

JUDSON C. CLEMENTS,
Chairman of the Interstate Commerce Commission.

151 Pages 6 & 7:

* * * * * * *

RULE 8.

Cars Detained for Various Causes.

Section 1. Cars detained at any point within the territory of this Association by reason of being billed to order and awaiting bills of lading or instructions, as to disposition and cars detained for want of proper shipping instructions, or for any cause for which shipper or consignee and not the Railroad Company is responsible, shall be subject to charges under these rules.

Sec. 2. When there is a dispute in regard to freight charges, and cars are held or refused on that account, or where car is reweighed at shipper's or consignee's request, regular Car Service charges must be assessed and collected, provided that no correction in freight charges or weight is made.

Sec. 3. Cars detained by reason of being improperly or insecurely loaded shall be subject to Car Service charges under these rules.

Sec. 4. When cars are detained at shipping point by shipper or consignee or stopped in transit for them or ordered from one destination to another, and Car Service charges cannot otherwise be col-

lected before forwarding, agents must enter amounts upon bills o lading and way-bills as advance charges.

* * * * * * *

152 STATE OF WISCONSIN,
In Supreme Court:

MENASHA PAPER COMPANY, Plaintiff in Error,
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant i Error.

I, Arthur A. McLeod, Clerk of the State of Wisconsin, do hereb certify that the attached are the original exhibits numbered 46 an 47 of the Plaintiff in Error herein, and are forwarded to the Cler of the Supreme Court of the United States in accordance with th stipulation of the parties herein.

In witness whereof I have hereunto set my hand and affixed th seal of said court this seventh day of February, A. D. 1916.

[Seal Supreme Court of Wisconsin.]

ARTHUR A. McLEOD,
Clerk of Supreme Court, Wisconsin.

[Endorsed:] File No. 24,979. Supreme Court U. S., October term 1915. No. 696. Menasha Paper Co., Pl'ff in Error, vs. Chicago & Northwestern Ry. Co. Stipulation as to certain exhibits. Filed Feb ruary 18, 1916.

Endorsed on cover: File No. 24,979. Wisconsin Supreme Court Term No. 696. Menasha Paper Company, plaintiff in error, vs Chicago & Northwestern Railway Company. Filed November 8th 1915. File No. 24,979.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1915.

No. 696

MENASHA PAPER COMPANY,
Plaintiff in Error.

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

FELIX J. STREYCKMANS,
Attorney for Plaintiff in Error.

CHAMPLIN LAW PRINTING CO.

INDEX.

CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1915.

No. 696

MENASHA PAPER COMPANY,
Plaintiff in Error.

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

This is an action by defendant in error, a common carrier against plaintiff in error, a paper mill and shingle mill operator, as consignee for the recovery of alleged demurrage assessed on certain cars of logs and bolts shipped to Menasha, Wisconsin, in June and July, 1908. There are two causes of action, one for demurrage on intra-state shipments, and the other for demurrage on inter-state shipments. Defendant in error recovered judgment against plaintiff in error for the full amount of the charges and interest and from this plaintiff in error appealed to the Supreme Court of the State of Wisconsin, where the judgment was

affirmed. Petition for rehearing was denied and writ of error sued out of this court. The evidence showed that the car service or demurrage charges (these two expressions being used synonymously) were for the alleged detention of car loads of bolts or logs consigned to the plaintiff in error at Menasha, Wisconsin. The suit was based on car service rules which were in effect at the time the shipments moved and which were attached to the complaint and will be found on page 11 of the record. In the court below many contentions were made by the plaintiff in error which were decided against it by the referee and the state court and the case will be argued in this court on the facts over which there is no controversy or which have been found by the referee and the state courts.

Shipments to the plaintiff in error were delivered on a side track contiguous to the mill of the plaintiff in error. The demurrage rules provided, among other things, that a charge of $1.00 shall be made for the detention of all cars after a period of forty-eight hours allowed for unloading had elapsed. No car service accrued on cars placed on the sidetrack of plaintiff in error, the evidence disclosing the fact that all such cars as were placed on this siding were unloaded within the forty-eight hours free time allowed by the car service rules.

The evidence showed, and the referee so found, that this sidetrack could accommodate seven cars but it was contended by defendant in error that the plaintiff in error was unloading the logs direct to the saw and that by reason of such method of unloading the plaintiff in error was only able to unload

two or three cars a day and for that reason defendant did not place more than two or three cars a day on said sidetrack.

On arrival at Menasha of the cars the plaintiff in error was telephoned by the clerks of the defendant in error stating that certain cars had arrived. No orders were given by plaintiff in error in response to such notices but the person receiving the telephone message would say " 'much obliged,' and that was about all" (Rec. 23).

From time to time the plaintiff in error would ask defendant in error to place more cars on the side track. Upon notification of the defendant by telephone that the cars had arrived, the cars were either held at Menasha station or forwarded to Snells Siding, eight miles south of Menasha, and held at that siding because of congestion in the Menasha yards. From day to day two or three cars were placed on the sidetrack for unloading but at no time was the track fully occupied with cars, there never being more than three or four cars, empty or full, on said track while its capacity was seven cars. For the cars held at Menasha and Snells Siding a charge of $1 per day was made.

The evidence further shows that owing to the large number of cars which were being shipped to the plaintiff in error a request was made on the Railroad Company not to forward any more cars loaded with bolts or logs to the plaintiff in error. This request was modified several times by requesting the railroad to release some cars because it was feared that the bolts and logs would be lost by fire. That after having carried out this agreement not to re-

ceive any cars destined for the plaintiff in error, the defendant in error, without notice to the plaintiff in error accepted large quantities of cars with the result that the accumulation referred to above took place. On this point the referee found as follows:

> "17. That on March 14, 1908, the plaintiff, at the request of the defendant, and not by reason of any conditions on its line necessitating such notice, notified the plaintiff's agents in Wisconsin and Michigan, 'until further advised' to discontinue to furnish equipment to load with bolts for the defendant; that this arrangement, called an 'embargo,' did not run out until the close of the year 1908; that this 'embargo' did not by its terms cover logs and was not thereafter modified by an agreement of the parties to cover logs; that in April and May, 1908, the said limited number of cars from certain shippers were forwarded by the plaintiff to the defendant upon defendant's request, but that such cars were not included among those set forth in Exhibits B and C attached to the complaint; that after shipment of these cars, the 'embargo' was applied again, so that it was the agreement between the plaintiff and the defendant not to ship any bolts to plaintiff, but this agreement was violated, and the cars mentioned in Exhibits B and C were shipped in violation thereof, and were shipped without notice from the plaintiff to the defendant of intention to ship the same, resulting in the arrival of cars in great numbers on certain days, as more particularly set forth in the exhibits attached to the complaint, and as a result of the violation of the embargo agreement as to bolts, hereinbefore found."

And this finding was upheld by the Supreme Court of Wisconsin.

In his third conclusion of law, the referee also found as follows:

> "That the embargo arrangement found in finding 17 was and is illegal, contrary to public policy and void."

There were two contentions made by the plaintiff in error in the court below. The first one that under the Act to Regulate Commerce no charge can be made for car service unless the same is specifically provided for under the car service rules commonly known as the carriers' tariff, in force and on file with the Interstate Commerce Commission at the time of the shipment.

That the alleged car service accrued short of destination—at Snells Siding and in the Menasha yards and is not covered by the rules in force at the time the cars moved and which were made a part of the complaint, there being no rule providing for the charging of car service under the circumstances admitted in this case.

Second, that the so-called embargo was not an embargo but was a statement to the carrierr that the consignee would not receive freight of a certain kind destined to it. That after having received this notice, the carrier had no right to accept and forward to the plaintiff in error the cars in question and that therefore even though the rules did provide for car service, on the facts stated in the record, the accrual of the car service was caused by the carrier accepting the cars when the consignee had notified the carrier that the cars would not be received and that the accumulation of the cars was a condition for which the railroad and not the consignee was responsible. For findings of referee see Rec. 18.

BRIEF.

Under Commerce Act railroads cannot collect for any service not "specifically set forth in carriers published tariffs" and tariffs and schedules must plainly show what the charges are for.

(a) "The Act to Regulate Commerce requires that carriers subject thereto shall publish, post and file 'all terminal charges * * * which in anywise change, affect, or determine * * * the value of the service rendered to the passenger, shipper or consignee,' and all such charges become part of the rates, fares and charges which the carriers are required to demand, collect and retain. Such terminal charges include demurrage charges."

(b) "On March 16, 1908, the Commission decided that demurrage rules and charges applicable to interstate shipments are governed by the act to regulate commerce, and therefore are within its jurisdiction and not within the jurisdiction of state authorities. Any other view would open a wide door for the use of such rules and charges to effect the discriminations which the act prohibits."

(c) "Demurrage rules and charges must be observed as strictly as transportation rules and charges. The Commission cannot, therefore, recognize as lawful any rule governing demurrage the application of which is dependent upon the judgment or discretion of some person, or which provides for exemption therefrom in certain exigencies in the creation of which the carrier has no part. Interstate tariffs containing such rules must be corrected or canceled."

Rule 23, Conference Ruling of Interstate Commerce Commission, to be found in Conference Rulings Bulletin No. 4 of the Interstate Commerce Commission, and also in Conference Rulings Bulletin No. 6 of said Commission at page 74, which was offered in evidence (Rec. 50).

This ruling is based on Sec. 6 of the Act to Regulate Commerce and is also referred to by Barnes in his work on Interstate Transportation, Sec. 290.

> "The requirements of the law with respect to the publication, posting and filing of 'all terminal charges * * * and all other charges which the Commission may require' removes from the carrier and from the shipper the right which existed under the common law to contract in reference to demurrage charges on any basis other than that specifically set forth in the carrier's published tariffs."
>
> *Peacock & Kerr* v. *C. R. R. Co.*, 18 I. C. C. R. 25, at 33.

> "The Act to Regulate Commerce contemplates not only just and reasonable rates, but plain and intelligent rates.
>
> "Complication, intricacy and involution invite, if they do not intend, injustice, inequality and discrimination.
>
> "A rate or tariff published and filed with the Commission cannot be held to be legal merely because of that fact, it must also be plain and intelligible. The Commission has emphasized this time and again in *as many* varying ways as the constantly recurring tariff inconsistencies have necessitated.
>
> *Porter, et al.* v. *St. L. & S. F. R. R. Co.*, 15 I. C. C. R. 1, at 4.

"The only satisfactory method of publishing rates is to definitely state the charges fixed between points clearly specified. * * *

Colorado Fuel & Iron Co. v. *Southern Pacific Co.*, 6 I. C. C. R. 488, at 519.

See also Barnes on Interstate Transportation, p. 712.

"It is the duty of common carriers, under the Act, to print, publish and file tariffs showing rates which are so simplified that persons of ordinary comprehension can understand them.

Pitts & Son v. *Railroad*, 10 I. C. C. R. 684, at 690.

"The law compels carriers to publish and post their schedules of charges upon the theory that they will be informative. A shipper who consults them has a right to rely upon their obvious meaning. He cannot be charged with knowledge of the intention of the framers or the carrier's canons of construction or of some other tariff not even referred to in the one carrying the rate. The public posting of tariffs will be largely useless if the carrier's interpretation is to be dependent upon tradition and the arbitrary practices of a general freight office.

"This Commission has long since repudiated the suggestion that railroad officials may be looked to as authority for the construction of their tariffs. (See *Hurlbut* v. *L. S. & M. S. Ry. Co.*, 2 I. C. C. R. 122.) We quote from Judge Cooley's opinion in that case: 'A classification sheet is put before the public for its information. It is supposed to be expressed in plain terms, so that the ordinary business man can understand it, and, in connection with the rate sheets, can determine for himself what he can be lawfully charged for transportation. The committee who prepared this classification have no more authority in construction than anybody else, and they must leave the document, after they have given it to the public, to speak for itself.'

"Tariffs are construed according to their language. The Commission refuses to recognize any other criterion."

Newton Gum Co. v. *C. B. & Q. Rd. Co., et al.*, 16 I. C. C. R. 341, 346.

Barnes on Interstate Trans., p. 714.

"Tariffs should be framed so clearly that their meaning will be absolutely clear to members of the shipping public for whose benefit the carriers' schedules are posted. If the application of a tariff is dependent upon the arbitrary practices of a carrier, it is little better than no tariff at all."

16 I. C. C. R. 341, 347.

"We cannot emphasize too strongly the necessity of making rules definite and clear. The law requires that all the rates must be published and filed so that the patron may ascertain exactly what he must pay for any service. There is no good reason why car service rates should be exempt from this provision. Therefore, car service rules should be clear and definite, and, when published, adhered to."

Ohio Shippers' Association v. *Ann Arbor Railroad Co.*, decision by Ohio Railroad Commission, Report 1907, p. 15, offered in evidence (Rec. 50).

"It has been uniformly held by this Commission that a shipper or consignee may not be required to pay a demurrage charge unless the carriers' tariffs provide for same in clear and specific form and manner. *Munroe & Sons* v. *M. C. R. R. Co.*, 17 I. C. C. Rep. 27; *Tioga Coal Co.* v. *C. R. I. & P. Ry. Co.*, 18 I. C. C. Rep. 414."

Crescent Coal & Mining Co. v. *B. & O. R. R.*, 20 I. C. C. R. 559, at 569.

See also *U. S.* v. *D. & R. G. Ry. Co.*, 18 I. C. C. R. 7.

See also *Germain Co.* v. *N. O. & N. E. R. R. Co.*, 17 I. C. C. R. 22, at 26.

> "The Illinois Central had no tariff provision authorizing a demurrage charge under the circumstances in this case, and that company should refund the demrurage which was wrong fully collected."
>
> *Beekman Lumber Co.* v. *La. Ry. & N. Co.*, 19 I. C. C. R. 343, at 347.

The rules relied on in this case did not permit the charging of car service until the side track was filled to its capacity.

In a case where the rules were similar to the rules relied on in this case, and the facts were the same, the Interstate Commerce Commission held demurrage could not be charged. The opinion is quoted at length in the argument.

U. S. v. *D. & R. G. Ry. Co.*, 18 I. C. C. 7.

The Supreme Court of Mississippi, in the following case, under a similar rule, held that the siding must be full before car service or demurrage can be charged.

> "Under demurrage rules providing that the delivery of cars consigned to a siding used exclusively by individuals located thereon shall be considered as effected when, if the siding be full, the road offering the cars would have made delivery had the siding permitted, delivery will commence, though the cars filling the siding are for another consignee having equal right to use the siding."

This decision is based on rule similar to 5C relied on in this case. See page 712 of opinion where rule 3B is set out as follows:

> "The delivery of cars consigned to or ordered to sidings used exclusively by certain firms or individuals located on such sidings shall be con-

sidered to have been effected either when such cars have been placed on the sidings; or, *if such sidings be full,* when the road offering the cars would have made delivery had such sidings permitted."

The court says, page 729 of opinion:

"If George had his full quota of cars, then he had no ground of complaint. * * * To sum up, the sole question of disputed fact involved in this record is: Was the siding so filled with cars consigned to George or to others entitled to the use of the side track as to prevent the railroad company placing the cars until after the expiration of the 'free time?' If so, the railroad was entitled to the verdict. If not, George should recover."

Railroad Co. v. *George,* 82 Miss. 710.

Decisions of Interstate Commerce Commission must be followed by courts.

"It has several times been held by the I. C. C. whose ruling this court is bound to follow, unless such ruling is inconsistent with law (*New Haven R. Co.* v. *I. C. C.,* 200 U. S. 361; 26 Supt. Ct. Rep. 272; 50 L. Ed. 515) that demurrage is ordinarily assessable against a carload shipment only at a point of origin or destination or at the place of reconsignment. *Munroe & Sons* v. *M. C. R. R.,* 17 I. C. C. 27; *Germain* v. *N. O. & N. R. Co.,* 17 I. C. C. 22; *U. S.* v. *D., etc. R. Co.,* 18 I. C. C. 7."

U. S. v. *Erie R. Co.,* 209 Fed. Rep. 283, 285.

"Such decision (of the Interstate Commerce Commission) we have have said with tiresome repetition, is peculiarly the province of the Commission to make and that its findings are fortified by presumptions of truth 'due to the judgments of a tribunal appointed by law and informed by experience.'"

Interstate Commerce Commission v. *C. R. I. & P. R. R. Co.,* 218 U. S. 88, at page 110.

No delivery effected where switching is unperformed.

"It has also been held that where a switching service is yet to be performed, delivery has not been effected. *McNeill* v. *S. Ry. Co.*, 202 U. S. 543, citing *Rhodes* v. *Iowa*, 170 U. S. 412; *L. & N. R. R. Co.* v. *Stock Yards Co.*, 212 U. S. 143; *Union Stock Yards Co.* v. *U. S.*, 164 Fed. Rep. 404."

Crescent Coal & Mining Co. v. *B. & O. R. R. Co.*, 20 I. C. C. R. 559-569.

See also

N. Y., N. H. & H. R. R. v. *Porter* (Mass. 1915), 108 N. E. 499.

Lifting the so-called embargo made carrier responsible for accumulation of cars.

"The Commission has held that where a shipper is compelled to pay demurrage charges through the fault of the carrier, the carrier must refund the charges so exacted." Citing authorities.

Schulz Co. v. *C. M. & St. P. Ry. Co.*, 20 I. C. C. R. 405.

Delivery.

All reported cases tend to show that a car service charge is, as a general rule, only to be made either after delivery or after notice of delivery.

Hutchinson on Carriers, Sec. 968, and authorities cited; also same author, Sec. 859.

Elliott on Railroads, Sec. 200a and cases cited; also same author, Sec. 1567.

Demurrage rules promulgated by a carrier must be construed most favorably to the shipper.

Staten Island Rapid Transit Ry. Co. v. *Marshall,* 117 N. Y. Supp. 1034; 136 Appellate Division Supreme Court Rep. 571.

This court has jurisdiction to review decision of state court construing a federal statute, to wit, the Act to Regulate Commerce, that act governing charges for demurrage on interstate traffic.

"Where a suit against a carrier for overcharges in violation of the Interstate Commerce Acts involved only a construction of the carriers published rate and its application to the shipments in question, the District Court had jurisdiction to determine the controversy without an application having been first made to the Interstate Commerce Commission."

Gimbel Bros. v. *Barrett,* 215 Fed. 1004.

"It is true that under the decision of the Supreme Court in *Texas Pac. Ry.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, the reasonableness of a rate or charge cannot be inquired into in an independent suit by court and jury, prior to action by the Interstate Commerce Commission finding the established charge to be unreasonable. In the case before us, however, the court is asked to say as a matter of law, what the schedule of rules in regard to charges for demurrage filed by the defendant company actually is without regard to the reasonableness or unreasonableness thereof."

Hite et al. v. *Central R. of New Jersey,* 171 Fed. Rep. 370-372.

Though a state court has no jurisdiction to affect a filed and published rate for demurrage, on an interstate shipment, it may in a proper action find

that such rate was charged for a greater length of time than that to which it was truthfully applicable and give judgment for the amount so overpaid.

C. & O. Ry. Co. v. *Rogers,* 84 S. E. Rep. 248.

ARGUMENT.

THIS COURT HAS JURISDICTION.

Under the Act to Regulate Commerce, no car service charges can be collected unless *specifically* provided for in "tariffs" posted and filed with the Interstate Commerce Commission. Consignee contended that there were no rules (or tariffs) on file with the Interstate Commerce Commission permitting a charge under the admitted facts of this case. The decision of this case does not involve a determination of the justness or reasonableness of the rules relied on by the railroad, but whether or not the charges claimed by the railroad could properly accrue under said rules. We admit that the Interstate Commerce Commission is the proper authority to determine the reasonableness of rates, tariffs, schedules and practices of the carriers of this country, but this does not take from the courts the power to determine whether under rules in force at the time a shipment moved, what, if any charges are due the carrier for its service. The defendant in error conceded this when it brought its suit in the state court asking that the court find the defendant

in error should pay a certain sum for car service. In order to determine the issue, it was necessary to find that the carrier did have, in conformity with the Act to Regulate Commerce, and the rules of the Interstate Commerce Commission, car service rules on file which *definitely* provided for the charges in question. The court so found and we contend it erred, as a matter of law.

We therefore have, for this court's determination, the question whether, under the Act to Regulate Commerce, the rules or tariffs on file permitted the charge made under facts which are not disputed, but as a matter of law. There is no doubt therefore that this being a question of law growing out of a Federal statute, decided against the right claimed by plaintiff in error, this court has jurisdiction to review the same. This question is covered by assignments of error numbered one and two, reading as follows:

> 1. The Supreme Court of Wisconsin erred in holding and deciding that there were any demurrage charges due for the reason that under the provisions of the Act of Congress commonly called the "Act to Regulate Commerce," and amendments thereto, no such demurrage charges can be charged and collected unless tariffs on file with the Interstate Commerce Commission provide for such charges.
>
> 2. The tariffs filed for complainant with the Interstate Commerce Commission at the time of the shipments in question moved did not authorize the charging and collecting of demurrage charges on the cars named in the complaint.

As to the alleged embargo, the lifting of which, without notice resulted in the assessment of the car

service charges in dispute, the state court held it was in violation of the so-called Hepburn Act of June 29, 1906, 34 Stats. 584, C. 3591. Plaintiff in error contends that act has no application to the issue and was never intended to prevent a consignee from refusing to accept freight from any particular shipper or all shippers. This decision was against plaintiff in error and involves another federal question which gives this court jurisdiction and is covered by assignment of error number three, reading as follows:

> 3. The Supreme Court of Wisconsin erred in holding and deciding that the so-called embargo was in violation of the so-called Hepburn Act of June 29, 1906, 34 Stats. 584, C. 3591.

THE RULES RELIED ON DID NOT AUTHORIZE THE ASSESSMENT OF CHARGES.

To properly construe the rules upon which suit is brought, it is well to refer to the decisions and rulings of the Interstate Commerce Commission, "the tribunal that is entrusted with the execution of the Interstate Commerce laws." In commenting on the decisions made by the Interstate Commerce Commission, this court says:

> "Such decisions we have said with tiresome repetition, is peculiarly the province of the Commission to make, and that its findings are fortified by presumption of truth 'due to the judgments of a tribunal appointed by law and informed by experience.'"
>
> *I. C. C.* v. *C. R. I. & P. Ry.*, 218 U. S. 88, at page 110.

As we have shown in our brief, the Interstate Commerce Commission in its rulings and decisions has repeatedly held demurrage is not usually assessable except upon delivery and there must be *definite* tariff authority for a charge at intermediate points; that tariffs or car service rules must plainly show what the charges are for; must be plain and intelligible and must be so simplified that persons of ordinary comprehension can understand them; that tariffs should be construed according to their language and not be dependent upon the arbitrary practices of a carrier; nor be dependent upon the judgment or discretion of some person. Furthermore, the courts have held that since car services are promulgated by the carriers and must be construed most favorably to the shipper. It being conceded that if the railroad can recover at all, it must recover under the rules made a part of the complaint herein, it becomes necessary to ascertain if such rules, using the canons of construction laid out above, permit the making of the charges sued for.

H. R. Williams testified he was chief inspector of the Wisconsin Demurrage Bureau, which had in charge the making and collection of the car service charges sued for. He was asked the following question:

> "Q. Will you refer to the rule that authorizes the imposition of such a charge?" and he made the following answer: "A. Rule 5, Section B and Section C. Section C is the one I would apply there, and Rule 5" (Rec. 41).

It will thus be seen that according to the construction placed upon the rules by the officer of the defendant in error having in charge the administration of the Car Service Rules it was determined that Sec. C of Rule 5 applied and it was under the provisions of this rule that the charges were made. The rule reads as follows:

> "Section C. The delivery of cars to private tracks shall be considered to have been made, either when such cars have been placed on the tracks designated, or, *if such track or tracks be full,* when the road offering the cars would have made delivery had the condition of such tracks permitted."

It developed, however, that in the course of the trial of the case and in the argument of same before the Supreme Court of the State of Wisconsin, counsel was compelled to base his claim on other rules which are referred to in the opinion of the Supreme Court of Wisconsin.

It so happens that the Interstate Commerce Commission on January 11, 1910, passed upon the rules which are similar to the rules relied upon in this case and which were applied under circumstances so nearly like the circumstances in the case at bar that the case might be said to be on all fours with the case at bar. The decision will be found in the case of *United States* v. *Denver & Rio Grande Railroad Company,* 18 I. C. C. R. page 7.

Sections 1 and 2 of Rule 5 of the Utah Car Service Association are referred to in the opinion of the Commission, the statement being made that said rules were filed with the Commission on August 28, 1906, and were in effect at the time the demurrage

is alleged to have accrued in July, 1907. Said Rule 5, Sections 1 and 2 are similar to Sections A and C of Wisconsin Rule 5 relied upon in this case.

Exhibits Nos. 46 and 47 (Rec. 72, 73, 74) are certified copies of Rule 4 and Rule 8 of the Utah Car Service Association which were offered in evidence and the certificates accompanying same show that said rules took effect August 28, 1906. This indicates that these rules are part of the rules which were before the Interstate Commerce Commission when it handed down its opinion in that case, the opinion stating that Rule 5, Sections 1 and 2 were effective on the same date as the rules indicated by the exhibits. It will be noted that Rule 8 provides that car service shall be charged on all cars "subject to order of consignors, consignees or their agents." This is similar to Section B of Rule 5 of the Wisconsin Car Demurrage Association, which provides that car service shall be charged on all cars "helding awaiting orders from the consignors or consignees." We thus find that the Utah rules above quoted are similar to Rule 5, Sections A, B and C of the Wisconsin Rules.

Rule 8 of the Utah Car Service Association, Exhibit No. 47, provides that "cars detained for a cause for which shipper or consignee and not the railroad company is responsible shall be subject to charges under these rules." Said Rule 8 of the Utah Car Service Association is similar to Rule 4 of the Wisconsin Demurrage Bureau set out in the opinion of the Supreme Court of the State of Wisconsin.

We, therefore, start out with rules of the Utah Car Service Association which are similar to the

Wisconsin Demurrage Rules under consideration, as is shown by the plain statement of the Interstate Commerce Commission in its opinion and by the certificate of the chairman of the Interstate Commerce Commission, as shown by Exhibits 46 and 47. The decision of the Interstate Commerce Commission was rendered by Mr. Knapp, the then chairman, and is quoted at length:

"Report of the Commission.

Decided January 11, 1910.

Knapp, Chairman:

"This is a complaint that the charge by defendant of $440 demurrage on certain carloads of cement detained at Thistle Junction, Utah, is unreasonable and unjust.

"Prior to May 1, 1916, the Reclamation of Service of the Government began the prosecution of an irrigation project at Strawberry Valley in the State of Utah. It became apparent that large quantities of material, including cement, would be required in connection with the work of erecting dams, tunnels, ditches, etc. The nearest station to Strawberry Valley on defendant's line is distant about 6½ miles. This station is known as Thistle Junction, where an agent of complainant is employed. In order to avoid the delay and expense incident to a wagon haul for the whole distance from Thistle Junction to Strawberry Valley, the officers of the Reclamation Service took up with the defendant the matter of constructing a spur or siding at a point nearer the work, where delivery of material and supplies could be made; and during the year 1906 a switch 700 feet long and connected at either end with the main line of defendant was constructed on defendant's right of way at the joint expense of the Government and defendant. The connection of the switch with the rails of defendant was at Mile Post No. 679, about 2½ miles west from Thistle Junction. Al-

though the Government contributed to the expense of constructing this switch, it was not a private switch but became, upon completion, the sole property of defendant and a part of its railway facilities.

"During the month of July, 1907, 52 cars of cement were shipped from Independence, Kans., billed to complainant at 'Mile Post 679, near Thistle Junction.' It appears that these cars were received at Thistle Junction as follows: July 6th, two cars; July 11th, nine cars; July 12th, eight cars; July 13th, six cars; July 14th, five cars; July 15th, four cars; July 16, five cars; July 22nd, seven cars; July 24th, two cars; and July 26th, four cars. Commencing July 8 and continuing until July 30th deliveries of two cars of cement per day were made from Thistle Junction to the siding in question, and from and after that date four cars per days were delivered. On the cars remaining undelivered at Thistle Junction from time to time there accrued the $440 demurrage complained of. At the time the cement reached Thistle Junction complainant could not use it on the work. A storage house had been built prior to the receipt of the first cars of cement, and others were in course of construction during the latter part of July and the early part of August. These warehouses were built alongside the switch, and the cement was taken from the cars and stored therein. After the switch was constructed the defendant permitted a stone company to erect a derrick about midway and served it with cars. It is alleged in the complaint that the occupation of the switch by the stone company was a serious inconvenience to complainant, but the evidence fails to sustain this allegation. Between the clearance of the switch and the derrick there was room for nine 37-foot cars, and the cement was received for the most part in cars of that length.

"There was sharp dispute at the hearing as to whether the Government's representatives ordered that no more than two cars per day should be delivered at the switch during the first part of July, and no more than four cars per day from the latter part of that month, *but it seems to us immaterial whether such orders were given or not.*

"Sections 1 and 2 of Rule 5 of the Utah Car Service Association, I. C. C. No. 2, to which the defendant is a party, filed by the Utah Car Service Association, effective August 28, 1906, **and in effect at the time the demurrage is alleged to have accrued, provide as follows:**

"'Section 1. Cars containing freight to be delivered on carload delivery tracks or private sidings shall be placed on the tracks designated immediately upon arrival, or as soon thereafter as the ordinary routine of yard work *will permit. Delivery will not be made on specially designated yard or tracks except when it is practicable to do so.* When such delivery cannot be made, on account of such tracks being fully occupied, *or for any other reasons beyond the control of the carrier,* delivery shall be made at the nearest available point.

"'Sec. 2. Delivery of cars shall be considered to have been effected at the time when such cars have been placed on the proper private or public delivery tracks, or if such track or tracks already contain such number of cars belonging to the same consignee as prevent prompt delivery, then such cars will be considered as having been placed when the road offering the cars would have delivered them had the condition of such tracks permitted.'

(These rules are similar to Sections A and C of Rule 5 set out in complaint.)

"The imposition of demurrage charges, if authorized at all, must have been provided for in these sections, as the tariffs of defendant in effect at the time show no other or different de-

murrage provision. *Demurrage does not ordinarily accrue except upon delivery of cars at the point specified in the bill of lading, and where charges are imposed for detention of cars at a point other than that so specified there must be definite* tariff authority therefor. *Germain Co.* v. *N. O. & N. E. R. R. Co.*, 17 I. C. C. Rep. 22; *Munroe & Sons* v. *Mich. Cent. R. R. Co.*, 17 I. C. C. Rep. 27.

"The sections above quoted state in clear terms the circumstances under which demurrage will accrue at a point of delivery not named in the bill of lading. As will be noted, reading the two sections together, the tariff provides that delivery of cars to a private or public track specified shall be considered to have been effected at the time when such cars have actually been placed thereon, and if the track is filled with cars billed to same consignee so that more cars cannot be placed thereon, delivery will be considered to have been made when they are placed on the nearest available track.

"It was the duty of defendant, under the provisions of its tariffs, before it would be authorized to assess and collect demurrage on a track other than that named in the bill of lading, to place at the disposition of complainant all the cars which the specified delivery siding could contain. The evidence shows that the siding could have easily contained nine cars. It further appears that at no time were more than nine cars received for complainant at Thistle Junction in any one day. At no time was the switch at Mile Post 679, to which the cars were billed, filled with cars consigned to complainant. It is obvious that had the cars been delivered at the tracks specified in the bill of lading in sufficient numbers to have filled it, and complainant had not unloaded them within the time named in the tariff, demurrage would properly have accrued upon that siding.

"*The fact, if it be a fact, that complainant ordered the delivery of two cars per day at one time and four cars at another did not warrant the imposition of demurrage charges for which there was no tariff authority.* It is not claimed by defendant that placing the cars on tracks at Thistle Junction was delivery at the switch specified, but the contention is made that in order to accommodate complainant cars were placed on this switch from day to day in the limited numbers above stated, the balance being held at Thistle Junction. Assuming that this was done, it did not authorize the charging of demurrage on the cars held at the latter station. *It follows that the charges in question were not assessed in accordance with any provision in defendant's tariff and therefore do not constitute a valid claim against complainant,* If the provisions subsequently inserted and now appearing in defendant's tariff had been in force at the time, demurrage would have accrued on cars held at Thistle Junction by direction of complainant. We rest our decision of this case on the proposition that demurrage can be assessed only in accordance with tariff provisions and that the rules of the Utah Car Service Association in effect when these cars were delivered did not authorize the demurrage charges in question.

"It appears that the amount of demurrage has not been paid by complainant. The usual method to pursue in such cases is to pay the charges under protest and then file complaint with the Commission, when, if the complaint is sustained, an order is entered directing the carrier to make the proper refund. Under the circumstances in this case no order is necessary."

Prouty, Commissioner, dissenting:

"I am unable to agree with the disposition of this case. The tariffs of the defendant in force

at the time provided that when cars were consigned to a private siding, demurrage should not begin to accrue until they had been placed upon such siding, unless such placement was prevented by 'reasons beyond the control of the carrier.'

"In this case the car was billed to the switch of the complainant. Thistle Junction was the nearest point to that switch. The cars were taken to Thistle Junction and were delivered at the switch, two cars per day during a portion of the time, and four cars per day during the remainder of the time. It is conceded that if the balance of the cars at Thistle Junction were not delivered for a reason beyond the control of the carrier, the demurrage properly accrued, and the only question is whether the act of the carrier in retaining the cars at Thistle Junction was induced by a reason beyond its control.

"The switch upon which these cars were to be delivered had been constructed at the joint expense of the United States and the defendant railroad, and both parties claimed the right to control it. It was intended primarily for the accommodation of the Government in its reclamation work.

"The *giving of the direction by the Government to place but two cars daily on this switch* was a thing over which the carrier had no control, and, under the circumstances, it seems to me that the defendant might properly obey this instruction and that the complainant can not be heard to urge the contrary. It is a novel proposition that the United States can defeat the right of the defendant to the demurrage which properly accrued for the detention of these cars at Thistle Junction by showing that the defendant obeyed its instructions."

U. S. v. *D. & R. G. R. R. Co.*, 18 I.C. C. Rep. 7.

It will be seen that this is a flat footed decision of the issue involved in the case at bar. No authority contrary to the decisions of the Interstate Commerce Commission set out by us in this brief, or to the decision which we have just quoted at length have been or can be referred to by counsel for defendant in error.

This brings us to a consideration of the decision of the Supreme Court of Wisconsin disposing of this decision. The Supreme Court in its opinion states that had the side track been filled, plaintiff in error could not have unloaded more than two or three cars a day and that "the respondent was not obliged to do a vain and useless thing by putting seven cars upon the track at one time and thus prevent the practical handling or unloading of any cars thereon by appellant contrary to its orders" Rec. 68). In other words the Supreme Court of Wisconsin stated that "the rule must have a reasonable construction." This is the crux of the decision and it is absolutely in opposition to all the decisions of the Interstate Commerce Commission and of the courts and of the spirit and intent of the Act to Regulate Commerce. As we have shown by our brief, Car Service Rules must be strictly construed and no charge can be made unless there is definite tariff authority therefor.

It is admitted that the track would hold seven cars and it is further admitted that the track was never actually fully occupied to the extent of either seven empty or loaded, or mixed empty and loaded cars. It is not denied, nor can it be denied, that it was the duty of the railroad to deliver the cars in ques-

tion on the sidetrack which served the consignee. That it was the duty of the railroad to make such delivery is indicated by the fact that every one of the cars in question were ultimately so delivered. Demurrage does not ordinarily accrue until the service of transportation has either been commenced or has ended. The duty of the railroad as a common carrier therefore does not cease until the car has either been actually or constructively placed on the so-called sidetrack. It is true that notice of the cars' arrival was given to the consignee in each case. The railroad was not notified, however, to hold these cars short of the sidetrack in question. The cars were held on the railroad's own motion and from time to time consignee *asked for more cars,* although as above shown it was the duty of the railroad to deliver the cars without the asking. The cars were, therefore, not held awaiting orders. Had the railroad delivered seven cars on the track in question and had the consignee asked that no more cars be delivered and that the remaining cars be held at Menasha or Snells Siding until orders were given to deliver the same, a different state of facts would arise. To say that a reasonable construction of the rules in question does not provide for the *actual* filling of the tracks with seven cars, because the consignee could not unload seven cars would be to make the question of charging car service on delivery track a disputed question of fact in all cases and "dependent on the judgment or discretion" of the officers of the carrier. For instance, if the railroad company decided to favor A, it could deliver cars on the side track as fast as they came in

and A might make special efforts to unload within the free time allowed by the rules. In shipments to B, however, whom we will presume the railroad desires to penalize, no such delivery would be made and when the charges were presented to B, the railroad would say it would not have made any difference had it delivered to B for the reason that B could not have unloaded. B would then answer, "had you given me seven cars, I would have employed a special force of men and would have unloaded them as fast as delivery was made." Here would arise a controversy, and the application of the rules might result in preferences to some shippers and penalties being imposed upon others in violation of both the spirit and the letter of the Act to Regulate Commerce. It is not within the province of a railroad to take into consideration the private business affairs of a consignee. It must treat all alike and that is the reason that the Interstate Commerce Commission held as it did in the case of *U. S.* v. *Denver & Rio Grande Railroad,* 18 I. C. C. 7.

The Supreme Court of Wisconsin, disregarding the object of the Act to Regulate Commerce, has decided that car service rules must be given "a reasonable construction" which depends upon the "judgment or discretion of some person," and which might result in discriminations between shippers. The Interstate Commerce Commission, whose "findings are fortified by presumptions of truth due to the judgments of a tribunal appointed by law and informed by experience," holds that the rules must be strictly construed and that there must

be "definite tariff authority" for the charges made. The case of *U. S.* v. *Denver & Rio Grande R. R. Co.* is dismissed by the Supreme Court of Wisconsin with the statement that the rules under consideration by the Interstate Commerce Commission were not similar to the rules involved in the case at bar—thus overlooking the plain statement in the decision that the rules were in effect when the shipments moved, and also the certificate of the chairman of the Interstate Commerce Commission that the rules offered in evidence were adopted in 1906 at the same time the rules were adopted which the opinion says were in effect (Rec. 72-74).

The statement is then made by the Supreme Court of Wisconsin that "in the case at bar the cars reached destination and notice of their arrival was given by respondent and the cars were thereafter held awaiting orders. The rules in force at the time in question clearly cover the instant case and justify the demurrage charges on any theory of the case." This statement is made in face of the fact that the destination of the cars w - the sidetrack of the plaintiff in error and that no car service accrued on any cars held on that track—all cars being unloaded within the free time allowed by the car service rules. It is a well established fact that all car load freight is to be delivered to side tracks of consignee and this rule applies to the case at bar for all cars were ultimately delivered to this side track. The authorities we cite hold that "where a switching service is yet to be performed, delivery has not been effected." The statement of the Supreme Court of Wisconsin assumes that it was the

duty of the consignee to order the cars placed on its sidetrack, whereas, as a matter of law, it was the duty of the railroad company to place such cars on said track without orders, and until such cars were placed, the railroad's duty as a common carrier was not complied with. The Interstate Commerce Commission in the case of *U. S.* v. *Denver & Rio Grande R. R. Co.* realized that it was the duty of the railroad to place such cars on the side track, to the full capacity of the side track, and so held. In its opinion, passing on this very question, the Interstate Commerce Commission says:

> "The fact, if it be a fact, that complainant ordered the delivery of two cars per day at one time and four cars at another did not warrant the imposition of demurrage charges for which there was no tariff authority."

In the case at bar the plaintiff in error from time to time asked that more cars be placed on its side track—a duty which the railroad should have performed without the asking. This is evidently the basis for the Supreme Court's statement that the cars were thereafter held awaiting orders." The same condition existed in the case of *U. S.* v. *Denver & Rio Grande R. R. Co.*, and on this point the Interstate Commerce Commission said, in addition to the statement quoted immediately above:

> "There was sharp dispute at the hearing as to whether the Government's representatives ordered that no more than two cars per day should be delivered at the switch during the first part of July, and no more than four cars per day from the latter part of that month, *but it seems to us immaterial whether such orders were given or not.*"

The Interstate Commerce Commission, in the above case, came to the conclusion that if any rule of the Utah Car Service Association applied to the facts in that case it must be Sec. 1 or Section 2 of Rule 5, which it set out in its opinion. These sections are similar to Section C of Rule 5 of the Wisconsin Demurrage Bureau which Mr. Williams, Chief Inspector of the Demurrage Bureau, claimed should apply. The other rules referred to by the Supreme Court of Wisconsin, and which were also contained in the Utah Car Service Association rules, were considered by the Interstate Commerce Commission to have no application at all to the facts in the case and the rules similar to Section C of Rule 5 were held not to provide for the charging of car service unless the track was fully occupied, which condition never prevailed in either case. In fact Section 1 of Rule 5 of the Utah Car Service Association which is referred to by the Commission in its opinion contained the following provision which cannot be found in any of the Wisconsin rules: "Delivery will not be made on specially designated yard or tracks except when it is practicable to do so." Even with this provision before it, the Commission held that no demurrage could be charged unless the side track was first filled with cars, and that notwithstanding the fact that the Government asked that no more than two or four cars be placed on said track because of its inability to unload more.

We submit that to hold that a railroad can determine for itself whether or not a consignee can unload freight delivered to it, would be opening the

way to numerous opportunities for favoring some shippers and penalizing others, resulting in rebates and discriminations to avoid which the Act to Regulate Commerce was passed.

Paragraph 7½ of the complaint sets out the basis of the action and will be found on page 10 of the record. It reads as follows:

> "7½. That said demurrage charges accrued at destination because of the congestion of the private side-tracks of defendant and the inability of plaintiff to make delivery thereon because of such congestion, and that each and every of said cars was duly tendered said defendant at destination; that said tender was refused by said defendant and said cars were held at the nearest available point to defendant's private track by the orders of defendant from the time of their arrival until the time ordered placed for unloading by said defendant, and thereafter were placed for unloading as fast as the said private side-track would accomodate."

A comparison of this paragraph of the complaint with the Wisconsin Car Demurrage rules shows plainly that the complaint was based on Section A of Rule 5. This rule is similar to Section 1 of the Utah Car Service Association rules passed on by the Interstate Commerce Commission and quoted at length in its opinion. In addition it will be noted that the complaint charges that the cars were not placed on the side track because of congestion and that the cars were thereafter placed for unloading "as fast as the said private side track would accommodate." It is admitted by all witnesses and found by the referee whose findings are approved by the Supreme Court of Wisconsin that the track

would accommodate seven cars and there were never more than three or four cars on the track at any time. Had the cars been placed on the side track to its full capacity, demurrage would have accrued on such cars as could not be so placed in accordance with the decision of the Interstate Commerce Commission.

The So-called Embargo.

The referee found in his 17th finding as follows:

"17. That on March 14th, the plaintiff, *at the request of the defendant, and not by reason of any conditions on its line necessitating such notice,* notified the plaintiff's agents in Wisconsin and Michigan, 'until further advised,' to discontinue to furnish equipment to load with bolts for the defendant; that this arrangement, called an 'embargo' did not by its terms cover logs and was not thereafter modified by an agreement of the parties to cover logs; *that in April and May,* 1908, *the said limited number of cars from certain shippers were forwarded by the plaintiff to the defendant upon defendant's request,* but that such cars were not included among those set forth in Exhibits B and C, attached to the complaint; *that after shipment of these cars, the 'embargo' was applied again,* so that it was the *agreement* between the plaintiff and the defendant *not to ship any bolts to plaintiff,* but this *agreement* was violated, and the cars mentioned in Exhibits B and C were shipped in violation thereof, and were shipped without notice from the plaintiff to the defendant of intention to ship the same, resulting in the arrival of cars in great numbers on certain days, as more particularly set forth in the exhibits attached to the complaint, and as a result of the violation of the embargo *agreement* as to bolts, hereinbefore found."

And by conclusion of law 3 reading as follows:

> "3. That the embargo *arrangements* found in Finding 17 was and is illegal, contrary to public policy, and void." (Italics ours.) (Rec. 67.)

On this point the Supreme Court of Wisconsin held:

> "It is clear that the so-called embargo as laid and operated by direction of appellant granted special privileges and was contrary to law, therefore raised by the respondent so as to avoid liability for discrimination as between shippers. Both the federal law and the state statutes provide against discriminations or special privileges, and the so-called embargo in question was in contravention of law."

Several authorities are then cited in support of the above contention, including the so-called Hepburn Act of June 29, 1906, 34 Stats. 584, c. 3591, and provisions of the railroad law of Wisconsin, which are copied from the Interstate Commerce Act and therefore need not be quoted here.

These authorities no doubt hold that it is unlawful for any common carrier to make or give any undue or unreasonable preference or advantage to any particular person, company, etc., etc., or to subject any particular firm, corporation, etc., to any undue or unreasonable prejudice or disadvantage in any respect whatever. But the opinion does not state how the so-called embargo gave any undue or unreasonable prejudice or advantage or disadvantage to any person or corporation. We admit that it is unlawful for a common carrier to refuse to carry freight for any particular person or company, or to place an embargo on freight to any particular

person or corporation without its consent. We challenge counsel to submit any authority, however, that holds that a person or corporation is compelled to receive any freight against its wishes. All the cases cited by court or counsel are cases in which a person is deprived of the right to ship to a consignee who is willing to receive the freight. In this case the consignee, as it had a perfect right to do, refused to receive any freight and the railroad company, in accordance with notice to that effect, notified its agents and connections that "on account of accumulation, you will, until further advised, discontinue to furnish equipmet to load with advised, discontinue to furnish equipment to load with bolts consigned to Menasha Paper Company" (Rec. 68). When the Menasha Paper Company notified the Railroad Company that it would receive freight from certain persons, the Railroad Company was not granting any special privilege to that company, but the Menasha Paper Company was granting a special privilege, if such a term may be used, and the Menasha Paper Company, not being a common carrier, did not come under the terms of the Act to Regulate Commerce or the Railroad Law of Wisconsin, and could not be held to violate the act in giving preference to certain shippers. The test is, could the railroad company have been indicted for the refusal to transport freight to a consignee who had already notified it that it would not receive the freight? We submit that neither the Act to Regulate Commerce, nor any other statute will compel a railroad to use the language of the Supreme Court of Wisconsin, "to do a

vain and useless thing." If the railroad had been indicted for refusal to transport the cars, it would have had a perfect defense in the fact that the consignee would not receive the freight.

If there is anything in the Act to Regulate Commerce or in any other law of the land prohibiting a consignee from refusing freight consigned to it or designating from whom it shall receive freight, we have been unable to find it and we challenge counsel to refer to same.

We submit that counsel can refer to no authority which holds that a shipper is doing an unlawful act when it notifies a common carrier it will not receive freight from certain shippers. This court has never so held and neither has the Interstate Commerce Commission. It is true that the Act to Regulate Commerce prohibits any unjust discrimination or special privileges and it has been repeatedly held, both by the courts and the Interstate Commerce Commission, that a common carrier must treat all shippers alike and that it is unlawful for a *common carrier* to accept freight for one consignee and refuse it for another. But we challenge counsel to cite a single case where it has been held unlawful for a common carrier to refuse freight to be shipped to a consignee who has already notified the common carrier that on account of congestion or for any other reason, it will not receive the same. All cases cited by counsel are where the common carrier established an embargo of its own volition and favored certain consignees. The only consignee involved in the so-called embargo in the case at bar was the plaintiff in error and the plaintiff in error itself directed the

railroad not to accept freight consigned to it, except in a few cases where it informed the railroad that it would accept freight from certain shippers only. There being only one consignee involved, the railroad could bestow no favors on shippers excepting in the case where it would, of its own volation, select certain shippers whose cars it would receive and forward. This was not the case, however as it treated all alike and was guided solely by the wishes of the consignee. The so-called embargo was therefore legal and the carrier had no right to lift the same with or without notice to plaintiff in error, dumping a large number of cars on plaintiff in error and causing the accrual of the alleged demurrage sued for.

If the embargo was legal, the consignee was acting within its rights in refusing to accept the freight; if the embargo was illegal, then it was by reason of the carrier doing an illegal thing in the first place, that resulted in the bunching of the cars and the consequent accrual of the alleged car demurrage.

We respectfully submit that the Supreme Court of Wisconsin erred in holding that a "reasonable construction" of the rules should prevail, and that the rules should have been strictly construed.

That there being no definite tariff authority for the charges made, the court should have held against the defendant in error.

That the defendant in error was legally bound to deliver the cars on the side track of the plaintiff in error without any request being made for that purpose.

That the side track never having been "fully occupied" within the meaning of the rules, demurrage could not be charged on cars held at "the nearest available point."

That the so-called embargo agreement was not in violation of the Act to Regulate Commerce and that the carrier therefore was responsible for the accrual of the car service because it violated said agreement.

Respectfully submitted,

FELIX J. STREYCKMANS,
Attorney for Plaintiff in Error.

IN THE

REME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1915.

No. 696

MENASHA PAPER COMPANY,
Plaintiff in Error.

vs.

HICAGO & NORTHWESTERN RAILWAY COMPANY,
Defendant in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR.

FELIX J. STREYCKMANS,
Attorney for Plaintiff in Error.

CHAMPLIN LAW PRINTING CO.

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STATEMENT.

In the statement of the case, counsel refers to the fact that if the side track in question was filled to visible capacity, but one car could be unloaded, etc. Reference is also made to the fact that if more cars were spotted, plaintiff in error could not unload. This is conjectural. It was physically possible to unload seven cars a day. The method used could have been changed and who could say how many cars could then have been unloaded? We contend in this regard that a common carrier has no right to determine for itself, the questions which arise at every industry it serves, as to unloading, etc. We contend that the rulings of the Interstate Commerce

Commission and the decision in the case of *United States* v. *Denver & Rio Grande, supra,* plainly indicate that in order to treat all shippers alike, the carrier should make delivery to the physical capacity of a side track. To permit a carrier to say, "Had we delivered more cars on your private track you could not have unloaded the same" would make the charging of car demurrage dependent upon the judgment of some person and would ultimately lead to discrimination, which is prohibited by the Act to Regulate Commerce.

We challenge counsel to show anything in the record which even indicates that the plaintiff in error made a request on the defendant in error to hold the cars short of this side track. In fact, the testimony is just to the contrary. Harry Ballou, who is the manager of the Shingle Department testified:

> "I didn't give any orders to the C. & N. W. R. R. Co., its agents or employes, to anyone connected with it, to hold our cars at Menasha or Snell Sign" (Rec. 42, 43).

Mr. Ballou further testified that he did not order the cars shown in Exhibits B and C shipped to him during the months of June and July (Rec. 34, 44).

John Ryan, the yardmaster for defendant in error testified that he was often requested by Harry Ballou during June and July, 1908, to give him more switching (Rec. 46).

C. S. Evenson, cashier of the defendant in error, testified that from time to time the Menasha Paper Company would telephone that they were in shape

to handle more cars but would not specify the car numbers.

> "They didn't always say how many cars they wanted. They didn't always receive orders because the switchman and yardmaster, if they would see empties in there, would take the empties out and place cars in without orders" (Rec. 24).

Evenson further testified:

> "The yard limits, I should imagine, are about between a mile and a mile and one-half. A car might be anywhere in that yard limit when I notified them" (Rec. 25).

This witness further testifies that when the Menasha Paper Co. was notified that the cars were in Menasha they "just acknowledged receipt, that is all"; that he received orders to place cars during the months of June and July, by telephone from the Menasha Paper Co. (Rec. 25).

Before concluding his statement, counsel says that plaintiff in error, to *stop the accumulation of cars,* requested defendant in error to place an embargo or blockade order against cars consigned to it and to raise it from time to time as requested. The court will note, however, from the referee's seventeenth finding of fact (Rec. 67), that the blockade was placed long before the car service is alleged to have accrued and was not placed to prevent an accumulation in June and July, but that the accumulation that took place in June and July resulted by reason of the defendant in error lifting the blockade.

The statement is further made that there was no agreement on the part of the defendant in error, to

give notice of the raising of the embargo and so it offered no defense to plaintiff in error. Our contention in this regard is that the finding of the referee in finding No. 17 that the embargo did not run out until the close of the year 1908, is sustained by the only testimony in the record on that subject, to wit, the testimony of F. J. Zoelle, at present the agent of the defendant in error at Madison, Wisconsin, and formerly agent for the defendant in error at Neenah and Menasha in 1908, when the car service is alleged to have accrued. He states (Rec. 36), referring to the embargo: "I think that it ran out with the year 1908, as all embargoes do." The referee refers to this testimony in his decision (Rec. 58). The defendant in error requested the referee in its requests No. 6 and 7 to find (Rec. 54) that there was never any agreement to notify defendant of the raising of the embargo and that defendant was not entitled to notice and that there was no agreement to keep said embargo order in force for any specified length of time. The referee refused to incorporate these requests in his findings and the Supreme Court of Wisconsin in giving its opinion states "the findings of the learned referee confirmed by the court and sustained by the evidence, support the judgment" (Rec. 68). We submit that defendant in error should not be given the advantage of all the findings of fact by the referee in this case on the ground that we cannot go back of a decision of the state court on questions of fact, and that defendant in error should, in addition to said findings, endeavor to have this court hold on questions of fact, differently than was held by the referee. It is true

that the Supreme Court of Wisconsin held in its opinion (Rec. 70) that there was no agreement that notice should be given of its removal and no duty rested upon the respondent to do so. This statement, in our opinion, however, is contrary to the findings of the referee and contrary to the testimony of Mr. Zoeller, who is the only one who testified on the subject, and whether or not a *duty* rested upon the respondent to give notice under the facts in this case, is a question of law which we take up in another part of this brief.

ARGUMENT.

Counsel argues that the first two assignments of error are not within section 237 of the Judicial Code and are frivolous. Authorities are cited to the effect that jurisdiction is given to this court only when the decision of the state court is against the right, privilege or immunity set up under the statute or laws of the United States. The statement is then made that the errors assigned do not raise such a question, as the decision of the lower court does not deny any right that was asserted by plaintiff in error under the laws of the United States. A sufficient answer to this is that it was contended that under the Act to Regulate Commerce, no car demurrage could be charged under the admitted facts in this case. The state court decided against this contention and the authorities cited by counsel

sustain the contention that this court has jurisdiction. For instance in *Murdock* v. *City of Memphis,* 20 Wall. 590, cited by counsel, is found the following language:

> "Secondly: It was no doubt the purpose of congress to secure to every litigant whose rights depended on any question of Federal law, that that question should be decided for him by the highest Federal tribunal, if he desired it, when the decision of the state courts were against him on that question. That rights of this character, guaranteed to him by the Constitution and laws of the Union, should not be left to the exclusive and final control of the state courts."

Counsel then states that the reason assigned by us why the tariffs on file with the Commission did not authorize the collection of this demurrage is that the demurrage was not assessed at destination and a private track of plaintiff in error was not fully supplied with cars. The statement is then made that these were questions of fact. We contend that whether, under the car service rules sued on, the side track was to be filled to its physical capacity or only to the extent that the consignee could unload is a question of law, there being no question as to the facts in the case, the side track admittedly never having been filled to its physical capacity.

After arguing that this court has no jurisdiction to determine what is to be comprehended under the term "destination" because counsel says it involves a question of fact, counsel says, at the conclusion of point I of their brief (p. 8) that this Honorable court has passed on this question in the case of *Berwind-White Coal Mining Co.* v. *Chicago & Erie R. R. Co.,*

235 U. S. 371, 375. If this court had jurisdiction of this question in the above case, why cannot it assume jurisdiction in the case at bar? It is true this court held in the above case that cars held 20 miles from Chicago, i. e., Hammond, Indiana, were held at destination for the purpose of assessment of demurrage. But the facts in that case were so different from the case at bar that a reading of same is all that is necessary to differentiate it. In that case the cars were billed to Chicago for reconsignment beyond and the cars were held "convenient to Belt Line on which cars could be transferred to a desired new destination, and the holding on such tracks of cars consigned as were those in question was in accordance with the practice which had existed for more than twenty years." The cars in question in the case at bar were not billed to Menasha for reconsignment beyond, but under the car service rules then in force were to be placed on the side track of the defendant as soon as the routine of the yard work would permit, unless the side track was fully occupied, when delivery was to be made at the nearest available point (Rule 5C, Rec. 12). Furthermore, in the case at bar, the cars were not held at Snell's siding in accordance with a practice which had at any time theretofore existed. In the *Berwind-White* case, *supra*, the cars were not to be delivered at Chicago, but to some "new destination" as stated by this Honorable court, and it made no difference whether the cars were held at Hammond or Chicago while awaiting orders from the consignee stating what this new destination was to be. This is the closest case counsel can cite and we suggest it has absolutely no bearing on the case at bar.

As to point II of counsel's argument (p. 9), that "the third assignment of error raises no Federal question here because it is not involved in the decision of the highest court of the state, nor is that decision against the federal right," we respectfully refer to foot of page 68 of the record where the Supreme Court of Wisconsin, in its opinion, says that the so-called embargo granted special privileges and that 'both the federal law and the state statutes provides against discrimination or special privileges and the so-called embargo in question was in contravention of law." Numerous federal authorities are then cited, all of these authorities being based on the Act to Regulate Commerce, including the Hepburn Act. Our contention is that the so-called embargo was not illegal under the federal statutes and that the consignee in this case had a perfect right to refuse to receive the freight in question and when the railroad accepted this freight from shippers in large quantities in violation of the notice given it by the consignee, the subsequent accrual of car service was due to a condition for which the carrier and not the consignee was responsible, and therefore no car service could be charged consignee under the authorities cited by us. The Supreme Court has invoked the federal statute to sustain its decision and decided against the plaintiff in error on a federal question, which we have a right to have reviewed by this court.

Counsel seems to take two positions on this subject. One is that the embargo, being illegal, the carrier was bound to lift it to avoid discrimination; the other position is that if the embargo was legal,

there having been no agreement as to when it was to be lifted, the carrier could lift it at any time without notice, regardless of the consequences. The so-called embargo was either legal or illegal. If illegal, the carrier should never have placed it in the first place and the subsequent lifting of the embargo with the accumulation of cars was a condition for which the railroad was responsible, and therefore no car service can be charged consignee. If the embargo was legal, then the carrier had no right to lift it until it received notice from the consignee that it was willing to receive the freight. We contend that the embargo was simply a giving of notice by the consignee that he would not receive any freight and the railroad acted on same. The consignee had a right to give such notice and such notice should have been respected by the carrier.

As to point III of counsel's brief that "Demurrage was properly assessed under tariffs lawfully on file with the Interstate Commerce Commission," we note that counsel now relies on Rule 5, Sections A B and C. We have shown in our original brief that these rules are similar to the rules passed on by the Interstate Commerce Commission in the case of *U. S.* v. *Denver & Rio Grande R. R. Co., supra.* Counsel italicizes Section B which provides that "Cars for unloading shall be considered placed when such cars are held awaiting orders from consignor or consignees," but this section cannot apply, for there were no orders given in the case at bar, nor were any orders necessary. The Supreme Court of Wisconsin has made the error of supposing that it was neces-

sary for the consignee to order the cars placed on its side track when as a matter of law and practice from time immemorial it is the carrier's duty to place cars on side tracks of industries that such carriers serve, and until such cars are so placed delivery has not been affected, and the carrier has not completed its duty as a common carrier. See *In re* Spotting Charges, 34 I. C. C. R. 609. Counsel assumes that because the cars were billed to Menasha that it was necessary for the consignee to give an order to deliver the cars on its side track. It is true, the record shows the consignee from time to time requested the railroad to place more cars on its side track, but even though it had not made such a request, it was the carrier's duty to place such cars on said track. This question is decided in the case of *U. S.* v. *Denver & Rio Grande R. R. Co., supra.* The cars in that case were billed to Mile Post No. 679. The point named in the bill of lading therefore was Mile Post No. 679. Still the Interstate Commerce Commission held that no delivery was effected until the cars were switched on the *side track* at Mile Post No. 679. The cars were held at Thistle Junction in that case, although they were billed to Mile Post No. 679. The cars in the case at bar were held at Snell's siding, although they were billed at Menasha. It was claimed in that case that the demurrage accrued at Thistle Junction; in the case at bar it is claimed that the demurrage accrued at Snell's siding. No demurrage accrued on the siding of the plaintiff in error—all cars being unloaded within the free time.

On this point we quote the following from the opinion of the Interstate Commerce Commission:

> "The fact, if it be a fact, that complainant ordered the delivery of two cars per day at one time and four cars at another did not warrant the imposition of demurrage charges for which there was no tariff authoriy" (page 9 of opinion).

And again at page 8 of the opinion the Commission says:

> "It seems to us immaterial whether such orders were given or not."

It will be noted that counsel maintains that the cars were held awaiting orders and for the accommodation of the plaintiff in error because plaintiff in error, he contends, could not unload any faster than two or three cars per day. The orders counsel refers to are the orders to place the cars from day to day, and the quotations set out immediately above from the opinion of the Interstate Commerce Commission in the case of *U. S.* v. *Denver & Rio Grande R. R. Co., supra,* dispose of that contention.

The remainder of counsel's argument is based on the following facts:

First. That consignee was kept supplied with as many cars as it could unload.

Second. Cars were spotted on the side track as fast as ordered by the consignee.

On these propositions we submit the following:

Under the rules, before car service could be charged at Snell's siding, there must be definite tariff authority for such charge. It was the duty of the railroad to keep the side track filled to its physical

capacity before it could hold the cars "at the nearest available point." To hold otherwise would leave it dependent upon the judgment of the officers of the railroad as to how much unloading the consignee could do, and would therefore result in discriminations and special privileges prohibited by the Act to Regulate Commerce.

Consignee was not compelled, under the law, to order any cars placed on its side track. The carrier was derelict in its duty when it failed to fill the side track to its capacity as it had not completed its duty as a common carrier until it had placed the cars on the side track of the plaintiff in error. The referee's 7th finding, therefore, that "the plaintiff held the cars until defendant notified it to place them upon the side track for unloading" is based on a misconception of the law and of the practice of common carriers. The consignee was under no duty to order cars on its side track, and therefore to state that cars were spotted on the side track as fast as ordered is not conclusive, this not being the test, but the test being, did the railroad keep the track "fully occupied."

In answer to point IV of counsel's brief that "the construction of the Utah Rules by the Interstate Commerce Commission has no application to the case at bar," we do not deem it necessary to reply to the first statement therein contained, for counsel's argument which follows the same indicates that the point is not seriously urged for counsel endeavors to differentiate between the Utah Car Service Rules and the Wisconsin Demurrage Rules, and maintains

the dissenting opinion of the Interstate Commerce Commission shows much more logic than the written opinion by the Commission indicating that the decision is worthy of being followed provided it is applicable to the case at bar.

In the second statement counsel says neither the Commission nor the Supreme Court of Wisconsin found any rules like defendant's Rule 5 in the case at bar. We have covered this in our original brief and all we ask is a careful reading of the Commission's decision on this point and a comparison of the rules quoted, and the rules introduced in evidence with Rule 5 of the Wisconsin Demurrage Bureau.

Counsel quotes the following from the Commission's decision:

> "The imposition of demurrage charges, if authorized at all, must have been provided for in these sections, as the tariffs of defendant in effect at the time show no other or different demurrage provisions."

The Commission, by this statement, evidently meant that they found no other provision in the tariffs which would admit of charging demurrage at a point short of destination. They realized, from their experience, that it is not necessary for a consignee to order a car placed on a side track—that it is the duty of the carrier to do so without orders. They further realized that there must be definite tariff authority for the imposition of demurrage charges and they therefore chose the nearest section they could find that would permit of charging demurrage at a point other than that specified in the bill of lad-

ing. Those sections were practically similar to Sections A and C of Rule 5 of the Wisconsin Demurrage Bureau—that is, the sections which provided that delivery to private sidings shall be made immediately upon arrival or as soon thereafter as the ordinary routine of the yard work will permit. "When such delivery cannot be made on account of such tracks being fully occupied, or for any other reason beyond the control of the carrier, delivery will be made at the nearest available point." This is the exact language found in Section 1 of Rule 5 of the Utah Car Service Association and in Section C of Rule 5 of the Wisconsin Demurrage Bureau.

Counsel says that the Supreme Court of Wisconsin, in referring to the decision of the Commission, held:

> "An examination of it will show that the Commission, in treating the case, found no rule similar to rules of the respondent which control the instant case, copies of which are attached to the complaint, and the case relied upon by appellant is based upon a rule in force at the time the demurrage accrued, therefore governed the case."

Whether or not there was any similar rule, we leave to this Honorable court upon comparison of the rules quoted by the Commission and the rules offered in evidence as Exhibits 46 and 47, and the rules attached to the complaint herein. We cannot understand the basis for this statement of the Supreme Court, for some of the rules are exactly similar.

The quotation from the opinion of the Commission that "If the provision subsequently inserted and

now appearing in defendant's tariff had been in force at the time demurrage would have accrued at Thistle Junction by direction of complainant," does not aid this court in any way, for the reason that the subsequent provision referred to is not before us, and is not open for construction.

The third statement of counsel, as to the destination of the cars, is not borne out by the record. Counsel says because the cars were billed to Menasha and the consignee was notified by telephone that the cars had arrived there, that the cars were not held short of destination. This assumes that the cars were not to be delivered on the side track. We submit that the destination of the cars was the side track of plaintiff in error at Menasha. On account of congestion the cars, upon arrival at Menasha, were forwarded to Snell's siding and held there. It is immaterial, however, whether the cars were held at Menasha or Snell's siding—the destination was the side track of plaintiff in error where the cars were eventually delivered. In the I. C. C. case the destination was Mile Post 679, but the Commission held that delivery was not effected by holding the cars at the Mile Post—delivery was not made until the cars were placed on the switch of the United States leading from the main track at Mile Post 679. To have held the cars at Mile Post 679 would have blocked the right of way of the railroad.

Fourth. Counsel says the I. C. C. case showed that there were never more cars on hand at Thistle Junction than were sufficient to fill the siding. What the opinion really says is (p. 9), "It further appears

that at no time were more than nine cars received for complainant at Thistle Junction in any one day." Page 8 of the opinion states in what numbers the cars arrived and on what dates. Considering that only "two cars per day were delivered to the switch during the first part of July," we submit there must have been times when there were more than nine cars at Thistle Junction. But we fail to see how this has any application to the case.

Counsel then lays great stress on the fact that because the cars had to go through Menasha on their way to Snell's siding that the cars were really delivered at Menasha. This is contrary to the ruling of the Commission that delivery is not effected until the cars are placed on the side track.

Counsel then falls into the same error that the Supreme Court of Wisconsin has fallen into and which other courts have also fallen into. They say (p. 22 of brief):

"We further submit that dissenting opinion of Prouty shows a much more forceful logic than the opinion written by Knapp."

The dissenting opinion by Mr. Commissioner Prouty will be found on page 10 of the report of the Commission. (See also page 24 of our original brief.) A careful reading of this dissenting opinion shows that it was followed by the Supreme Court of Wisconsin in its decision.

It is a well recognized fact among the courts and bar of this country that a dissenting opinion is no opinion at all, and is not recognized as good law until adopted by a majority of a court of higher jur-

isdiction. Opinions of the Interstate Commerce Commission are governed by the same rule. This court has spoken on the subject in the case of *I. C. C.* v. *D. L. & W. Ry. Co.*, 220 U. S. 235, where it says on page .. of the opinion:

> "The Circuit Court rendered no opinion other than the statement that a majority of the court were in accord with the reasoning and conclusions expressed by the dissenting opinion of the chairman of the Commission, and that they did not think it necessary to add anything to his exhaustive discussion of the questions presented.
>
> "We say the contentions all reduce themselves to this, because in their final analysis all the other differences, in so far as they do not rest upon the legal proposition just stated, are based upon *conclusions of fact as to which the judgment of the Commission is not susceptible of review by the courts. Baltimore & Ohio R. R.* v. *Pitcairn*, 215 U. S. 481. This at once demonstrates the error committed by the lower court in basing its decree in annulling the order of the Commission upon its approval and adoption of the reasons stated in the opinion of the dissenting members of the Commission. This follows, since the reasons given by the dissenting members, except in so far as they rested upon the legal proposition we have just stated, proceeded upon premises of fact, which, however cogent they may have been as a matter of original consideration, were not open to be so considered by the court because they were foreclosed by the opinion of the Commission. Doubtless the mistake of the court below in this respect was occasioned by overlooking the scope of the Hepburn Act, and because the decision below was made in June, 1909, before the announcement of the opinion in the *Pitcairn* case.
>
> "* * * Moreover, the contention is not open to review, because the legal question of the

right of the carrier to consider ownership under the second section having been disposed of, the finding of the Commission that to permit the enforcement of the rule would give rise to the preferences and engender discriminations prohibited by the Act to Regulate Commerce *embodies a conclusion of fact beyond our competency to re-examine.*

"* * * This, however, again, in a two-fold sense, is directly in conflict with the *findings of fact* made by the Commission; first, because it disregards the *findings as to the operation of the business of a forwarding agent*, and, second, because it overlooked the express findings of the Commission," etc.

"As it follows, from the reasons just stated, that the court below erred in annulling the order of the Commission and enjoining its enforcement, its decree to that effect is reversed and the case is remanded with directions to dismiss the bill."

We, therefore, submit that if any consideration should be given to the opinion of the Interstate Commerce Commission in the case of *U. S.* v. *Denver & Rio Grande Ry. Co., supra,* the opinion of the majority of the Commission should prevail. In fact, the only authority submitted by counsel which has any direct bearing on the case at bar is the dissenting opinion of one member of the Commission, which this court has held should not be followed.

Fifth. The siding in that case was not a private switch. The opinion plainly states it was constructed at the joint expense of the government and the railroad. See page 8 of opinion, also page 20 of our original brief.

The same condition applied in the case at bar. The side track being owned by the railroad and the plaintiff in error and the railroad kept in repair. See testimony of Mr. Zoelle, agent of the railroad (Rec. 45, 46): "I don't know who owns that track. I know that the Chicago & North Western has been repairing it during the time that I have known it." Mr. Ryan, yardmaster for defendant in error says (Rec. 48): "At time we spotted cars for that machine shop or foundry on the side track that was used for the Menasha Paper Company." Mr. Ballou, general manager and vice-president of plaintiff in error, says (Rec. 35): "I think the track upon which the cars were spotted, alongside of our mill belonged to the Northwestern Railroad. I always assumed it was theirs because they kept it up. The Northwestern keeps it in repair." "We had no contract arrangement with the Northwestern respecting the ownership of the track to my knowledge" (Rec. 36).

Conference ruling 79 of the Interstate Commerce Commission offered in evidence by defendant in error (Rec. 48) provides that a private track is a track "to which the railroad has no right of use superior to the shipper," and that "this definition is based, as we think it should be based, upon consideration of the carrier's right to the use of the track rather than the ownership of the land or rails." The testimony in this case shows the railroad had unlimited jurisdiction over the track, using it for delivering to other consignees than the plaintiff in error (Rec. 48) and spotting cars on the track without asking permission or getting orders (Rec. 24).

The authorities referred to on page 23 of counsel's brief under heading V no doubt hold that common carriers shall furnish cars without discrimination or the granting of special privileges. We admit that the Hepburn Act and sections 2 and 6 of the Act to Regular Commerce so provide.

The case of *Chicago, etc.* v. *Hardwick Elevator Co.*, 226 U. S. 426, cited by counsel, no doubt holds that there is "a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor."

But neither the Act to Regulate Commerce nor any authority cited by counsel holds that a consignee cannot notify a railroad company that it will not receive any freight. In other words, the Act to Regulate Commerce and the decisions hold that a common carrier cannot dictate to whom it will transport freight nor from whom it will receive freight for transportation. But this is not the condition in the case at bar. The railroad was willing to transport the freight for all who desired its services but the plaintiff in error, not the railroad, refused to receive the freight.

Had the railroad against the wishes of the Menasha Paper Company placed an embargo against that company alone, such an act would have been in violation of the Act to Regulate Commerce. And if the railroad of its own accord selected certain consignors and refused others the act would have been violated. But in the case at bar the embargo was placed against The Menasha Paper Company at its own instance and request and not at the instance of the railroad. The only one who could

complain was the Menasha Paper Company. As to the requests to permit certain shippers to forward their freight, this was at the request of the Menasha Paper Company. The Menasha Paper Company had a right (not being a common carrier and not covered by the act) to refuse freight from any or everybody. And the record shows nobody complained, but the consignors, recognizing that the Menasha Paper Company could lawfully refuse their shipments, instead of complaining to the railroad, wrote to the Menasha Paper Company asking that an exception be made in their particular case (Rec. 38 *et seq.*). None of the cases cited by counsel show a condition of affairs similar to the case at bar. They are all cases where the consignor objected to the railroad refusing their freight for transportation where the consignee was willing to accept same or where the consignee objected to being singled out by the railroad by an embargo which prevented shipments being made to such consignee who was willing and anxious to receive the same.

The referee in the case at bar specifically found the embargo was placed by the carrier, not because of conditions on carrier's line, but because specially requested to do so by plaintiff in error (Rec. 67).

On page 27 of brief counsel states that the illegality of the embargo is because it applied to plaintiff in error, alone, but counsel overlook the fact that it was placed at plaintiff in error's own request. We contend that this is the very reason that the embrago was legal, it being against plaintiff in error alone and at plaintiff in error's request.

Counsel says that plaintiff in error had contracted for more bolts and logs than it could accept and unload and quotes a letter on page 28 of brief to sustain this statement.

It will be noted, however, that the letter is silent as to the contract which plaintiff in error had made. The fact is that it is a matter of common knowledge, especially in the State of Wisconsin, that forest products are not bought in any particular quantity but contracts are made to receive the product of certain producers and the year 1908 was an exceptional year for the getting out of forest products. The correspondence with shippers shows that none of them claimed any contract right to have the plaintiff in error receive the wood (Rec. 36). This is plainly indicated by the testimony of Mr. Ballou and also the witnesses for defendant in error who stated that there was a congestion of traffic in the Fox River valley at that time (Rec. 35). The station agent of defendant in error wrote to his superintendent that "The Menasha Paper Company only want to take in the timber that is actually contracted for" (Rec. 38-39).

Counsel then cites authorities to show that there can be discrimination in the assessment of car demurrage charges and that the assessment of car demurrage comes within the Act to Regulate Commerce, the same as charges for transportation. We agree with this proposition. In fact it is because the Act to Regulate Commerce applies to car demurrage that we contend that the rules must be construed in such a way as will prevent discrimination and the granting of special privileges. It is for

this reason that the Interstate Commerce Commission has held that there must be definite tariff authority in the rules for whatever charges are made and that where the rules provide that cars shall be held at the nearest available point only when the sidetrack is fully occupied, the rule means what it says, and that the sidetrack must be filled by the carrier before demurrage can be charged at the nearest available point. The cases cited by counsel sustain our contention.

It will be noted that counsel devotes Point VI of their brief to the production of authorities to the effect that a railroad may maintain an embargo under certain conditions.

Counsel says on page 35, however, that the embargo may not be used as a means of discrimination against a consignor or consignee. The cases cited hold that owing to conditions on its line or for reasons beyond its control a carrier may declare an embargo. What better reason could the defendant in error have had for declaring an embargo against the defendant in error than the fact that the defendant in error refused to receive the freight? This was a condition not created by the carrier and was beyond its control. It will be noted that the shippers of the wood to the plaintiff in error did not complain to the railroad because of the refusal of the plaintiff in error to receive the wood but, on the contrary, the communications which were introduced in evidence by the defendant in error, plainly indicate that the shippers of the wood appreciated the right of the plaintiff in error to refuse to receive the freight and asked from time to time that

the plaintiff in error notify the railroad company that certain cars would be received by plaintiff in error. Thi indicates plainly that the consignors and the consignee never held the carrier liable for the embargo and that it was understood between shipper and receiver of freight that the embargo was due to the request made by the consignee. No authority has been cited by counsel which holds that this is illegal. As we state in the original brief, the Menasha Paper Company, not being a common carrier, did not come under the provision of the Act to Regulate Commerce and could refuse to receive freight from a particular shipper as there is no law which would compel it to accept the freight against its desires. If the Menasha Paper Company had made contracts for freight and refused to receive the same, the shipper had a remedy at law outside of the Act to Regulate Commerce and this was a question between shipper and receiver of freight and had nothing to do with the railroad. As to the correspondence between the parties, see record 38 *et seq.*

It no doubt is the duty of a carrier to furnish cars to a shipper when the consignee is willing to receive the freight, but a different condition exists when the consignee positively notifies a carrier that it will not receive the freight.

Counsel cites authorities on page 34 of brief to the effect that the right of a carrier to embargo shipments when conditions warrant, is clearly decided. We contend that the conditions in the case at bar warrant the railroad in maintaining the embargo in question. The case of *Houston, etc. R. Co.*

v. *Smith*, 63 Tex. 322, is cited on page 36 of counsel's brief and holds that while the company in that case declined to take and transport the cotton of appellant's as offered, during the same period it did take and transport for others cotton, as it was tendered. Other cases are cited which are of a like nature but it will be noted on examination of all the authorities cited that they are cases where transportation is refused a shipper where the consignee agrees to accept the same or is desirous of the freight being transported. In other words, it is illegal to issue an embargo against a consignee if he is willing to accept the freight, and permit freight to be shipped to the competitors of the same consignee. This is well illustrated in the case of *Rogers & Company* v. *Philadelphia, etc.*, 12 I. C. C. R. 309, cited by counsel on page 36 of brief, where the railroad company placed an embargo against Rogers and delivered hay to Rogers' competitors without Rogers' consent. This was plainly giving Rogers' competitors special advantage and discriminating against Rogers in violation of the Act to Regulate Commerce. That condition does not apply in this case.

Point VII, page 37 of brief, is devoted to the subject that the embargo was partial only because counsel says the embargo agreement applied only to bolts and not to logs and that the demurrage accrued on both logs and bolts. The facts are that if the embargo had been maintained on the bolts, the accumulation of cars would not have taken place and demurrage would not have accrued on any cars. Discrimination between logs and bolts however sought to be made by counsel is a discrimination in

theory only. The railroad company treated the embargo as applying to bolts and logs as will be noted by the correspondence that took place between the station agent of defendant in error and his superior officers, and other parties (see Rec. 37 *et seq.*).

It will be noted on page 38 that Felix Perron refers to shingle bolts and *logs* and asks plaintiff in error to notify the railroad to accept the same, indicating that the railroad had refused to accept either *logs* or bolts. See letter from Mr. Zoelle to Mr. Brigham, general freight agent of the defendant in error, on page 40 of record wherein it is stated: "Again referring to the matter of allowing the parties to load cedar bolts and *logs* for the Menasha Paper Company," etc. Also see opening of letter of E. W. Reade at the foot of page 40 of record, where Mr. Reade states that the chief train dispatcher of the defendant in error advised him that he would be unable to furnish any cars to load bolts and *logs*, etc.

As to the testimony of Mr. Klapp referred to by counsel with reference to Western Classification No. 44, will state that this testimony simply amounts to the statement that under the Western Classification, logs not otherwise specified take lumber tariff rates and that wood bolts take Class E rates. This statement has nothing whatever to do with this case as it simply refers to classification of these articles and does not show that there was not a commodity rate on the logs and bolts in question. Wherever there is a commodity rate, the class rates do not apply.

Mr. Sensenbrenner (Rec. 49) testified: "There is no distinction between the kinds of wood that I know of. We use the bolts and the logs for the same purpose—for the manufacture of shingles." The correspondence between the agents of the defendant in error and other persons, indicates that the embargo was applied to bolts and logs. We contend, however, that even though it could technically be said that the embargo referred only to bolts, the violation of said embargo is what caused the accrual of the demurrage in question, as is found by the referee in his 17th finding of fact, and, therefore, if the court holds that consignee had a right to refuse this freight, or to ask the railroad to place an embargo on the same, this case should be reversed in whole, and not in part.

We respectfully submit that the record in this case plainly shows that the rules relied upon do not permit the charging of car demurrage under the circumstances shown in this case, and that the alleged embargo was legal and that the violation of the same by the defendant in error caused the accumulation of the cars which resulted in the charges being made.

We respectfully submit that the judgment of the Supreme Court of Wisconsin should be reversed in whole.

Respectfully submitted,

FELIX J. STREYCKMANS,
Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 696.

MENASHA PAPER COMPANY, PLAINTIFF IN ERROR.

v.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

GEO. LINES,
WILLET M. SPOONER,
LOUIS QUARLES,
Attorneys for Defendant in Error.

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BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF FACTS.

This is a writ of error to review a judgment of the Supreme Court of the State of Wisconsin affirming a judgment of the Circuit Court of Winnebago County, Wisconsin, in favor of defendant in error, wherein and whereby it recovered of plaintiff in error the sum of $1,424.23 damages and costs as demurrage.

The action was brought by defendant in error, a common carrier, as plaintiff, against plaintiff in error, a shipper, as defendant, to recover demurrage charges assessed on cars consigned to plaintiff in error at Menasha, Wisconsin. These were two causes of action, the first for cars in intrastate commerce and the second for cars in interstate commerce, and defendant in error recovered for the entire amount of demurrage claimed. (Record pp. 61, 70.) The demurrage recovered in the second cause of action was assessed under tariffs lawfully on file with the Interstate Commerce Commission, and which appear at length. (Record p. 11.) The case was referred by the Circuit Court of Winnebago County to a master with power to try, hear, and determine, and the master made findings of fact and conclusions of law which were adopted and affirmed by both the Circuit Court and the Supreme Court of Wisconsin. (Record p. 68.) The interstate shipments only are involved on this writ of error.

Owing to the crowded condition of its piling ground plaintiff in error had no room on which to unload and store the freight on these cars and so was unloading them direct to its saw mill. This saw was located opposite the center of said track of plaintiff in error and in order to unload a car in this manner it had to be spotted opposite the saw. If the siding was filled to visible capacity but one car could be unloaded, i. e., the car that happened to be opposite the saw; but if either three or four cars (dependent on their length) were spotted on the siding they could be moved by hand or "pinched down," and thus brought successively opposite the saw and the whole number unloaded. This was what was

being done by plaintiff in error during the time in question. (Record pp. 19, 24, 27, 57.)

The cars were arriving for plaintiff in error in large numbers, much in excess of the capacity of its private track, and as they arrived at Menasha plaintiff in error was notified thereof, some of the cars were held in the yards at Menasha, and some were taken beyond to "Snells," a siding six to eight miles away, and they were held and spotted for unloading as ordered by plaintiff in error. (Record pp. 19, 24, 26, 57.)

Demurrage was computed from the giving of the notice of arrival and not from the spotting on the private track, none or but very little demurrage accruing after the cars were spotted. The demurrage was claimed as properly assessed under Rules 1, 3, 4, and 5 of the Tariff and the courts so found. (Record pp. 19, 69.)

Plaintiff in error, to stop the accumulation of cars, requested defendant in error to place an "embargo" or "blockade order" against cars consigned to it and to raise it from time to time as requested. Defendant in error at first agreed so to do, but did not continue the embargo in force, as it deemed such an arrangement illegal when done for the sole benefit of one consignee. The Supreme Court of Wisconsin held that a contract to maintain such an embargo was void because inhibited as a discrimination by the Act to Regulate Commerce of June 26, 1916, and that there was no agreement on the part of the defendant in error to give notice of the raising of the embargo, and so it afforded no defense to plaintiff in error. (Record p. 68.)

ARGUMENT.

I.

THE FIRST TWO ASSIGNMENTS OF ERROR ARE NOT WITHIN SECTION 237 OF THE JUDICIAL CODE AND ARE FRIVOLOUS.

The first two assignments of error are to the effect that defendant in error can collect no demurrage unless it be provided for by tariffs on file with the Interstate Commerce Commission and that the tariffs on file in this case did not authorize the collection of this particular demurrage. (Record p. 1.) There is no dispute as to what the tariffs were. This is settled by a finding and admitted by the answer. (Finding 8, Record p. 19; Paragraph 4 of answer, Record p. 16.)

The sole jurisdiction of this court to review the decision of the highest court of a state is granted by *section 237* of *The Judicial Code*. This section reads as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, com-

mission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ.

It shall be competent for the Supreme Court to require by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court, although the decision in such case may have been in favor of the validity of the treaty or statute or authority exercised under the United States or may have been against the validity of the State statute or authority claimed to be repugnant to the Constitution, treaties, or laws of the United States, or in favor of the title, right, privilege, or immunity claimed under the Constitution, treaty, statute, commission, or authority of the United States."

The last paragraph was added by amendment December 23, 1914, but no attempt has been made to bring the question here for review by certiorari or other equivalent process.

The balance of the section is but a re-enactment without change of *section 709 United States Revised Statutes (4 F. S. A., 467; 1 Comp. Stats., 575.)* By the plain terms of the statute jurisdiction is given to this court only when the decision of the State court is against the right, privilege, or immunity set up under the consti-

tution or laws of the United States. This has been repeatedly held.

Murdock v. Memphis, 20 Wall., 590.
Sauer v. New York, 206 U. S., 536, 546.
Leathe v. Thomas, 207 U. S., 93, 98.

The writ of error should be dismissed because the errors assigned by the first two assignments of error do not appear on the record to have been especially set up and claimed in the court below.

De Lamar's, etc., Co. v. Nesbitt, 177 U. S., 523.
Speed v. McCarthy, 181 U. S., 269.

In order that this court may review a federal question it must appear from the record itself that it was passed on by the lower court.

Sec. 237 The Judicial Code, (Quoted *supra.*)

An inspection of the record shows that these questions were not raised by the answer (Record p. 15), nor do they appear in the exceptions of plaintiff in error to the findings of the referee or the opinion of the court or referee (Record p. 63), nor elsewhere in the record, excepting only in the petition for rehearing in the Supreme Court of the State of Wisconsin. (Record p. . .). This petition was denied by that court without a hearing and it has often been held that an attempt to raise a federal question in this wise is too late.

Bushnell v. Crooke, etc., Co., 148 U. S. 690.
Pim v. St. Louis, 165 U. S., 273.
Capitol Nat. Bank v. First Nat. Bank, 172 U. S., 425.

The errors assigned by plaintiff in error are not within the statute, for the decision of the lower court

does not deny any right that was asserted by plaintiff in error under the laws of the United States. The action is based on a tariff fair on its face and no attempt has been made to challenge its validity, the sole question arising being its application to the facts in the case, and this action therefore is analogous to

Penna. R. R. Co. v. Puritan Co., 237 U. S. 121.
Illinois R. Co. v. Mulberry, etc., Co., 238 U. S. 275.

The jurisdiction of this court to review the first two assignments of error is maintainable if at all under the rule of

Knut v. Knut, 200 U. S., 12, 19.
St. Louis, etc., R. Co. v. Taylor, 210 U. S., 281, 293.
Adams Express Co. v. Croninger, 216 U. S., 491, 499.

ut we contend that these assignments are not within he rule of these cases, but are within the rule of

De Lamar's, etc., Co. v. Nesbitt, 177 U. S., 523,

here it was held the fact that plaintiff and defendant nake adverse claims under a law of the United States oes not of itself present a federal question.

The reason assigned by plaintiff in error why the ariffs on file with the Commission did not authorize the ollection of this demurrage is that the demurrage was ot assessed at destination and the private track of plain- ff in error was not fully supplied with cars. The ques- ons of the location and capacity of the private siding of laintiff in error as actually used, its proximity to the ilroad company's yards and the nearest available hold

tracks therefrom, the condition of the siding, and the method of unloading used by plaintiff in error at this time, were submitted to the referee and decided by him as questions of fact. (Record pp. 57, 18.) In such cases this court has held that the contentions so treated as questions of fact are too devoid of merit to support a writ of error to the highest court of the state and it will be dismissed as frivolous.

St. Louis etc., R. Co. v. Shepherd, 3 Sup. Ct. Rep. 274. (Not yet officially reported.)

The exact place to be comprehended under the term "destination" under the facts and circumstances of the case at bar was the subject of considerable testimony and of specific findings by the referee. Not only was this disposed of as a question of fact but the exact question of what is destination for the assessment of demurrage has been passed upon by this court in a case much more aggravated than the instant case. It is conceded that all cars were held at the Railway Company's yard a few blocks from the siding of the plaintiff in error or at "Snell's," being a hold track not over seven miles therefrom and the nearest one available thereto. (Record p. 22.) In the case on which this court has passed it was decided that cars held twenty miles from Chicago, i. e., Hammond, Indiana, were held at destination for the purpose of assessment of demurrage, and that the allegation that they were not was too frivolous to support a writ of error.

Berwind-White Coal Mining Co. v. Chicago & Erie R. R. Co., 235 U. S., 371, 375.

II.

THE THIRD ASSIGNMENT OF ERROR RAISES NO FEDERAL QUESTION HERE BECAUSE IT IS NOT INVOLVED IN THE DECISION OF THE HIGHEST COURT OF THE STATE, NOR IS THAT DECISION AGAINST THE FEDERAL RIGHT.

The third conclusion of law of the referee who tried the action originally involved the question of the validity of a contract to maintain an embargo, for he held "that the embargo arrangement found in finding 17, was and is illegal, contrary to public policy, and void." (Record p. 21.)

The Supreme Court of the State of Wisconsin, however, did not sustain the judgment solely on this ground but held that

> "Complaint is made by appellant that the so-called embargo was raised without notice to it, and that such raising caused the bunching of cars and the delay in unloading. The alleged embargo was placed at the request of the appellant. There was no agreement that notice should be given of its removal and no duty rested upon the respondent to do so."

In holding as it did it affirmed the former decisions of that court to the effect that there was no duty imposed by law upon the carrier to notify the shipper of the raising of an embargo.

> *Peet v. C. & N. W. R. Co.*, 20 Wis., 594, 598.
> *Riddle, Deen & Co. v. B. & O. R. Co.*, 1 I. C. R., 778.

This decision of the court on the facts was made on the uncontradicted testimony given by Harry Ballon,

the officer of plaintiff in error who made the arrangement for the embargo with the officers of defendant in error. He testified that no agreement or understanding existed between plaintiff in error and defendant in error whereby defendant in error ever agreed to notify plaintiff in error when the embargo was to be raised. (Record p. 53.)

This question was in the record pursuant to proper requests and exceptions on the part of plaintiff in error and was therefore properly passed on by the Supreme Court of the state. (Requests 6 and 7, Record p. 54) and (Exceptions 2 and 3, Record p. 62.)

It is familiar law that where the highest court of a state decides a question on a non-federal ground its decision will not be reversed even though it may have also decided erroneously upon a federal question, but that in such a case this court will dismiss the writ of error.

Eustis v. Bolles, 150 U. S., 361, 370.
Leathe v. Thomas, 207 U. S., 93, 98.
Murdock v. Memphis, 20 Wall, 590.
Castillo v. McConnico, 168 U. S., 674, 679.

Even though the decision of the state court can be said to be based on the construction of the Hepburn Act, yet its construction is in favor of the act, i. e., it held that the embargo agreement violated the act, which is equivalent to holding that the statute of the United States is paramount, consequently the decision is not within the purview of *section 237 of The Judicial Code.*

III.

DEMURRAGE WAS PROPERLY ASSESSED UNDER TARIFFS LAWFULLY ON FILE WITH THE INTERSTATE COMMERCE COMMISSION.

By the first two assignments of error plaintiff in error challenges the right by defendant in error to collect demurrage under the tariffs on file. It is here claimed that under the findings of fact such demurrage is properly collectable under rules 1, 3, 4 and 5 thereof, construed in the light of rules 2 and 8. These rules read as follows: (Italics ours.)

RULE 1.

CARS SUBJECT TO RULES.

All carload freight, all freight taking carload rate, and all freight in cars, whether full carload or not, taking track delivery, will be subject to Car Service and Trackage Rules.

EXCEPTIONS: Cars loaded with live stock, through consignments when not held for orders, private cars detained on the tracks of the owner of such cars, and Company material are not subject to Car Service Rules and shall not be included in reports to the Manager.

RULE 2.

FREE TIME ALLOWED.

Section A. On all commodities for loading or unloading forty-eight (48) hours (two (2) days), free time will be allowed.

RULE 3.

Computing Time.

Section A. *On cars for* loading or *unloading the free time shall be computed from the first 7:00 o'clock A. M. or 12:00 o'clock noon following the notice of arrival* or after placing.

Section B. Notification of arrival of freight shall be served immediately upon arrival by personal act, or deposited in the United States post-office, or other means mutually agreed upon between agents and consignees. If by mail, notice shall date from time of deposit in the United States mail.

RULE 4.

Cars Held for Various Purposes.

Cars which are stopped in transit or *held by orders of* shippers or *consignees* for reconsignment to points beyond, for change of load, for amended instructions, for change in billing, milling, shelling, cleaning, etc., or on account of improper, unsafe or excessive loading, or *for any other reason for which the* shipper or *consignee is responsible, shall be subject to Car Service charges after the expiration of forty-eight (48) hours from arrival at the point of stoppage*, and all Car Service must be collected or billed as advances when cars go forward.

RULE 5.

Placing Cars for Delivery and for Loading.

Section A. Cars containing freight to be delivered on carload delivery track or private sidings shall be placed on the track designated as soon as the ordinary routine of yard work will permit. When delivery cannot be made on account of such track being fully occupied, or for any other reason beyond control of the carrier, delivery shall be made at the nearest available point.

Section B. *Cars for unloading shall be considered placed when such cars are held awaiting orders from* consignors or *consignees*, or for the payment of freight charges after the notice mailed or otherwise given, or for the surrender of bills of lading.

Section C. *The delivery of cars to private tracks shall be considered to have been made*, either when such cars have been placed on the tracks designated, or, *if such track or tracks be full, when the road offering the cars would have made delivery had the condition of such tracks permitted.*

RULE 8.

Charges.

At the expiration of the free time allowed, if cars are not loaded or unloaded, a minimum charge of One Dollar ($1.00) per car per day or fraction of a day shall be made.

The application of these rules to the circumstances of the case are dependent on the particular facts and such facts have been settled by the findings. These findings are not subject to review herein, this court has no jurisdiction to go behind these but merely to pass on the questions of law raised thereon.

Clipper Mining Co. v. Eli Mining & Land Co., 194 U. S. 220.
Dower v. Richards, 151 U. S., 658, 672.

An inspection of the opinion of the Supreme Court of the State of Wisconsin (Record p. 68) shows the court opened its opinion with the following words: "The findings of the learned referee, confirmed by the court and sustained by the evidence, support the judgment."

These findings were detailed and explicit. They show that because of the congestion of defendant's pri-

vate track cars could not be spotted thereon as fast as they arrived at Menasha (Finding 6, Record p. 19). The carriers compliance with rule 3 quoted *supra* is specifically found by finding 7 (Record p. 19), which reads as follows:

> "7. That when each of the cars in question arrived, the plaintiff notified the defendant of each arrival by telephone, giving the car numbers * * *"

Findings 3, 4, 15 and 16 (Record p. 19) show that the exhibits attached to plaintiff's complaint giving time of placing and releasing cars and amount of demurrage due were by the referee found sustained by the evidence and the judgment was based thereon.

Should the court look into the testimony, to see the exact situation, the clear preponderance of the testimony shows that the private siding leading to the plant of plaintiff in error was long enough to permit the spotting of seven cars thereon. (Record pp. 24, 26.) The testimony also shows that because of the extremely crowded condition of piling ground of plaintiff in error they were unable to load logs thereon, and consequently were unloading from the car direct to the saw, thus sawing up the logs as fast as they were unloaded. (Record pp. 24-27, 57.) Such method of unloading prohibited the spotting of more than four cars at the most, as the saw was in the middle of the siding. Manifestly but one car could be spotted in front of the saw. After that was unloaded it was necessary to move the cars along down the siding to spot the second car before the saw, and so on. Such movement of cars was impossible if the siding was full.

There is no question but what demurrage was properly collectable under rule 4 and paragraph B of rule 5 of

the tariff quoted *supra*, as "cars held for orders." This is specifically covered by findings of fact 6, 7, 8 and 9, as follows:

> "6. *That each and every of the cars in question was held at destination* on account of congestion of defendant's private side-track, due to its inability to unload and *awaiting orders from defendant.*" (Italics ours.)
>
> "7. That when each of the cars in question arrived, the plaintiff notified the defendant of each arrival by telephone, giving the car numbers, and, according to the general custom, with only occasional exceptions, *the plaintiff held the cars until defendant notified it to place them upon the side-track for unloading.* (Italics ours.)
>
> "8. That defendant did not order the cars placed for unloading sooner than as shown in Exhibits B and C, attached to the complaint, because, practically, defendant could not handle any more cars than it did, and hence did not ask for them.
>
> "9. That no request or demand was ever made by order to spot cars or otherwise that plaintiff spot cars for unloading on any public delivery track or any place other than defendant's said private side-track, and that defendant would have been at all times unable to unload said cars had they been so spotted."

These findings were thus referred to by the Supreme Court of Wisconsin in its opinion:

> "In the case at bar the cars reached destination and notice of their arrival was given by respondent and the cars were thereafter held awaiting orders. The rules in force at the time in question clearly cover the instant case and justify the demurrage charges on any theory of the case."

The claim of plaintiff in error that it was the duty of the carrier to fill the private siding of the consignee to its full visible capacity and keep it in that condition even though by so doing the consignee's unloading would be hampered, is we contend too frivolous to warrant serious argument here. It seems to us that no better answer to that question can be given than is found in the opinion of the Supreme Court of Wisconsin, where it said:

> "* * * * The appellant contends that Section C, Rule 5 hereafter quoted is controlling. Under this rule it is insisted that it was the duty of respondent to keep the track of appellant full and that it would accomodate seven cars, and that only three or four and never to exceed five cars were kept thereon, hence no demurrage could have been charged under the rule referred to. We are of opinion that the referee properly construed the rule as applied to the facts in this case in holding that the track was full to its capacity when demurrage was charged. The rule must have a reasonable construction; and it appears from the evidence that while seven cars could be placed upon the track at one time, not to exceed five could be placed there so as to make its use for unloading practicable, and this situation was well understood by the parties and cars placed as required accordingly. So it is clear that the track was kept full within the meaning of the rule. * * *
>
> "The construction placed upon the rule by both parties, viz: that the track was full when the number of cars which could be handled there were upon it was the sensible and practical construction. The respondent was not obliged to do a vain and useless thing by putting seven cars upon the track at one time and thus prevent the practical handling or unloading of any cars thereon by appellant contrary to its orders. The referee and court below

found upon sufficient evidence that while the appellants' side track from which cars were unloaded could accomodate about seven cars it had an actual capacity, as used during the time in question, of only three or four cars, or possibly five; that as defendant used the side track more cars could not have been placed upon it and unloaded than were actually placed upon it and unloaded during the time in question, to-wit: about two or three cars a day." (Rec. p. 68.)

Defendant in error therefore claims that under the facts disclosed by the findings and the testimony, demurrage was properly assessed as consignee was duly notified on the arrival of the cars: consignee was kept supplied with as many cars as it could unload; cars were spotted when ordered by consignee and were held in the yards and [illegible]rest available hold track, and were all spotted for unloading without any delay in switching.

The same question has been before a State court in *New Orleans, etc., R. Co. v. George & Co.*, 82 Miss., 711; 35 So., 193, 198.

where it was claimed that demurrage could not be charged because the railway company did not keep the siding full to its theoretical capacity. The court said:

"Whether the siding was filled with cars consigned to George or to the cotton compress, in either event the appellant was excused from delivering upon the siding. *If George had his full quota of cars, then he had no ground of complaint.*"

Plaintiff in error also claims that demurrage can only be assessed at destination and that that was not done in this case. This is in turn predicated on the assumption that destination means the private siding of

the consignee. What is and what is not destination is a question of fact and therefore the decision of the state court is binding on this court.

Where cars are consigned for loading on a vessel for export, destination does not mean the pier at which the vessel loads but the railroad yards adjacent thereto, and demurrage is collectable on cars waiting in those yards.

Hite v. Central Ry. Co., 171 Fed. 370. (C. C. A. 3rd Cir.)

The facts in the case show that the private siding of plaintiff in error was not over three or four city blocks from the general freight yards of defendant in error, known as the Neenah and Menasha yards. (Record p. 25.) It also appears that after these yards became filled with cars some of them were carried on beyond Neenah and Menasha and were held at a siding known as Snell's Siding. About 26 or 27 cars out of the 84 on which demurrage accrued were thus moved down to Snell's. (Record p. 27.) This siding was the nearest siding available to the Neenah and Menasha yards, and all cars held either in these yards or at this siding arrived at Menasha, notice of arrival was given to plaintiff in error while there, and they were thereafter held sufficiently close to the siding of plaintiff in error to permit there being switched thereon without any loss of time. (Record pp. 20, 27.)

Only the excess cars were taken to Snell's, there were always cars waiting at the Menasha yards. The method of handling the cars was clearly shown by the testimony of the yardmaster Ryan, thus: (Record p. 27.)

> "At the time those cars were at Snell's I know whether there were also cars at the Neenah and Menasha yards consigned to the Menasha Paper Company. I know whether there were at all that time such cars which had been there over two days. In spotting cars I would try to get the oldest cars that were in the yards, that was a standing order, to spot the oldest cars first. We might make a mistake once in a while and get a newer car, but they were all over two days. The Menasha Paper Company, at that time, were unloading direct to the saw. They could unload about two or three cars a day, dependent upon the timber. They could not handle any more at the saw."

As to the cars that were held at Snell's there was no delay in switching them upon the siding of plaintiff in error when they were ordered in by it or when it had room to receive them. This is clearly covered by finding 10 as follows: (Record p. 20.)

> "That there was no delay on the part of the plaintiff in switching the cars upon the side-track, or refusal or inability of the plaintiff to place the cars, nor any insufficiency of terminal facilities, nor any congestion in the yards of the plaintiff which prevented the placing of cars upon the side-track in question, when ordered."

Defendant in error knows of no rule of law which compels a common carrier to keep cars within a few hundred feet of the siding of the consignee, but it is sufficient that they shall be kept at the nearest available point, which means any point so near as to enable them to be spotted upon the siding without delay when ordered in by the consignee or when its siding becomes empty.

IV.

THE CONSTRUCTION OF THE UTAH RULES BY THE INTERSTATE COMMERCE COMMISSION HAS NO APPLICATION TO THE CASE AT BAR.

Plaintiff in error urges as controlling here a case decided by the Interstate Commerce Commission, i. e., *United States v. Denver & Rio Grande R. Co.* 18 I. C. C. R., 7, construing certain rules of the Utah Car Service Association and claiming that it is at variance with the decision of the Supreme Court of Wisconsin. This contention is not well founded.

First. Because the rulings of the Interstate Commerce Commission are not decisions but are mere rules promulgated for the guidance of the carriers and shippers and as such are prospective only. They cannot relate to or in any wise affect past transactions. The above mentioned report was not made until January, 1910, whereas the charges in question accrued in 1908.

Second. In construing the rules of the Utah Car Service Association neither the Commission nor the Supreme Court of Wisconsin found any rule like defendant's Rule 5 in the case at bar covering cars held for orders. This is clearly shown by the fact that the former refers only to Utah Rule 5, which it quotes in full and then says:

> "The imposition of demurrage charges, if authorized at all, must have been provided for in these sections, *as the tariffs of defendant in effect at the time show no other or different demurrage provision.*" (Italics ours.) (18 I. C. C., p. 9.)

and by the further quotation:

> "If the provision subsequently inserted and now appearing in defendant's tariff had been in force at the time, demurrage would have accrued had cars been held at Thistle Junction by direction of complainant" (18 I. C. C. p. 10).

This was exactly the holding of the State Supreme Court, where it said, referring to this decision:

> "An examination of it will show that the commission in treating the case found no rule similar to rules of the respondent which control the instant case, copies of which are attached to the complaint, and the case relied upon by appellant is based upon a rule in force at the time the demurrage accrued, therefore governed the case." (Record p. 69.)

Third. The destination in the I. C. C. case was Mile Post 679, and Thistle Junction, where the cars were held, was short of destination. In the case at bar, all the cars were received at Menasha, telephone notice of their arrival and railroad's willingness to deliver and spot was given, and pursuant to custom and directions of defendant they were held awaiting specific orders. Consequently the cars arrived at destination, for they were billed to Menasha and arrived at Menasha, and they were not held short of destination.

Fourth. The I. C. C. case showed that there were never more cars on hand at Thistle Junction than were sufficient to fill the siding. Consequently there was no reason for holding them short of the siding. The record in the case at bar shows a very different state of facts. All the cars in question could not be placed on the siding. There were constantly on hand more than seven cars. Also it is not claimed in the I. C. C. case that the arrival of the cars at Thistle Junction was

delivery, but that claim is made in the case at bar, for the cars were destined to Menasha and arrived at that point. They were not, as in the other case, destined to Mile Post 679 and had failed to go as far as that, but had arrived at Thistle Junction only, an intermediate point. That is this is the crux of the distinction between the cases and of the decision of the Commerce Commission is shown by the following language:

> "Demurrage does not ordinarily accrue except upon delivery of cars *at the point specified in the bill of lading*, and where charges are imposed for detention of cars at a point other than that so specified, there must be definite tariff authority therefore. * * * The sections above quoted state in clear terms the circumstances under which demurrage will accrue *at a point of delivery not named in the bill of lading.*" (*Italics ours.*)

We further submit that dissenting opinion of Prouty shows a much more forceful logic than the opinion written by Knapp.

Fifth. The siding in question in that case was not a private switch—it was the sole property of the railroad and consequently it had the right to place cars thereon, even though contrary to the request of the consignee. The contrary is true of a private track as in the present case.

Sixth. The record in the I. C. C. case discloses that cars could be unloaded from the whole of the sidetrack. In the case at bar no more than three cars could be unloaded from the track because of the condition of the piling ground and the circumstance that they had to be unloaded direct to the saw. Therefore when the track contained three cars it was fully occupied,

because no more cars could be spotted there to permit unloading, i. e., no more than three cars could be spotted there for unloading and that was therefore its capacity. It was just as though the private track had consisted of a trestle which would contain four cars and a piece of track on the ground which would contain three —the track would be full of cars for unloading when three cars were spotted thereon.

V.

A CONTRACT TO MAINTAIN AN EMBARGO AGAINST A PARTICULAR SHIPPER IS CONTRARY TO SECTION 1 OF THE HEPBURN ACT, BEING THE ACT OF JUNE 30, 1906.

Section 1 of the *Hepburn Act, 34 Stats. L. 584*, c. 3591, 3 *Fed. Stats. Ann.* 810 defines transportation thus:

> "'*Transportation*' *shall include cars* and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; *and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor,* and to establish through routes and just and reasonable rates applicable thereto." (Italics ours.)

Said section further provides that a common carrier must upon application make connections with side tracks "*and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper.*"

Section 3 of the said act to regulate commerce, provides that:

"It shall be unlawful for any common carrier subject to the provisions of this Act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

This court has construed *section 1 of the Hepburn Act* above quoted to apply to and include demurrage charges.

Chicago etc. R. Co. v. Hardwick Elevator Co, 226 U. S., 426.

St. Louis Ry. v. Edwards, 227 U. S., 265, 268.

Section 6 of the *Interstate Commerce Act* now provides as follows:

"That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. * * * The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the

aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. * * * "

This same section also provides:

"No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. * * * "

The Act to Regulate Commerce has been exhaustively considered by this court in the case cited above, i. e.,

Chicago etc. R. Co. v. Hardwick Elevator Co., 226 U. S., 426.

wherein was called in question the validity of state legislation regarding the duty of the carrier to furnish cars to shippers. This court held that such state legislation was invalid on the ground that Congress had legislated on the subject and that it has imposed a duty on carriers to deliver cars to all shippers alike. In that case this court, speaking through Mr. Chief Justice White said:

"The purpose of Congress to specifically impose a duty upon a carrier in respect to the furnishing of cars for interstate traffic is of course by these provisions clearly declared. That Congress was specially concerning itself with that subject is further shown by a proviso inserted to supplement section 1 of the original act imposing the duty under certain circumstances to furnish switch connections for interstate traffic, whereby it is specifically declared that the common carrier making such connections 'shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper.' Not only is there then a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the Act to Regulate Commerce give remedies for the violation of that duty. * * * "

The nature of the action of defendant in error complained of by plaintiff in error is clearly summed up in the findings of the referee as follows:

"17. That on March 14, 1908, the plaintiff, *at the request of the defendant, and not by reason of any conditions on its line necessitating such notice,* notified the plaintiff's agents in Wisconsin and Michigan, 'until further advised,' to discontinue to furnish equipment to load with bolts for the defendant; that this arrangement, called an 'embargo' did not by its terms cover logs and was not thereafter modified by an agreement of the parties to cover logs; *that in April and May, 1908, the said limited number of cars from certain shippers were forwarded by the plaintiff to the defendant upon defendant's request,* but that such cars were not included among those set forth in Exhibits B and C, attached to the complaint; *that after shipment of these cars, the 'embargo' was applied again,* so that it was the *agreement* between the plaintiff and the defendant *not to ship any bolts to plaintiff,* but

this *agreement* was violated, and the cars mentioned in Exhibits B and C were shipped in violation thereof, and were shipped without notice from the plaintiff to the defendant of intention to ship the same, resulting in the arrival of cars in great numbers on certain days, as more particularly set forth in the exhibits attached to the complaint, and as a result of the violation of the embargo *agreement* as to bolts, hereinbefore found."

And by conclusion of law 3 reading as follows:

"3. That the embargo *arrangement* found in Finding 17, was and is illegal, contrary to public policy, and void." (Italics ours.)

It is to be noted that what plaintiff in error complains of was not the right of defendant in error to give an embargo notice to all shippers prohibiting their sending freight into certain specific territory because of accidents, great accumulations of cars, or *vis major*, but was its failure *to make and keep a contract* to *maintain* an embargo against *it alone*. This distinction was clearly passed upon by the referee as is shown by the portions of the findings above quoted that are italicised.

A glance at the undisputed testimony in this case will accentuate the illegality of claim of plaintiff in error and show the gross discrimination to which such practice would lead if permitted to be carried on by common carriers. Plaintiff in error had contracted for more pulp wood, i. e., bolts and logs, than it could accept and unload as it arrived. It appeared from letters written by defendant's manager, who had charge of this matter, to the defendant in error at or very shortly after the demurrage was assessed and the controversy arose, that the reason for the accumulation of pulp wood was that plaintiff in error had contracted for more than it could use. This letter says:

" * * * 'You probably recall your personal visit to our office the latter part of last winter in which you took up with us the matter of cedar shipments then arriving so fast as to cause a so-called blockade. You will also remember that we were doing all in our power to stop these shipments and were also doing all that we could to unload as fast as possible, by running our shingle mill night and day, and by piling the material in our yards and had also filled up private grounds alongside your tracks near your passenger depot, and that about the time you called all these yards had become filled to their limit and that it was becoming a physical impossibility to unload any more and that we were about to that point where only the daily requirements of the mill was being used to unload. * * * "
(Record p. 51.)

In that situation the only thing that plaintiff in error could do was to have the cars held at the railroad company's yards awaiting orders, and have them spotted and unloaded direct to the saw, and that was what was being done. (Record p. 24.) To ease off this situation plaintiff in error demanded of defendant in error that it issue an embargo refusing to give to shippers cars for bolts (but not logs) consigned to plaintiff in error at Menasha, and this defendant in error did. This embargo order is set out in the record as Plaintiff's Exhibit 33 (Record p. 37).

The embargo was applied and shipments of bolts ceased coming to plaintiff in error. The shippers, however, objected, and plaintiff in error thereupon directed defendant in error to raise the embargo from time to time as to particular shippers. This is clearly shown by correspondence of plaintiff in error offered in evidence

by defendant in error. (Record pp. 37-41.) These clearly show that at the request of plaintiff in error defendant in error raised the embargo as against M. Pierron, then as against Escanaba Wooden Ware Co., "it being understood that they (defendant in error) will not accept timber from any other shippers," and then that a shipper in Watersmeet was permitted to load twenty cars, and F. G. Hood & Co. at Pentoga, two cars per day.

After such requests, defendant in error raised the embargo generally, so as not to be guilty of or a party to discrimination as between shippers and of this plaintiff in error complains.

The *Act to Regulate Commerce* and the state statutes regulating common carriers as above quoted provide against discrimination or special contracts of any kind.

The effect of this act on the duty of the carrier to furnish cars is exemplified by a case in this court,

> *Penna. R. R. Co. v. Puritan Co.*, 237 U. S., 121, 133,

the court there holding that a shipper on reasonable demand is ordinarily entitled to all the cars it can load but that where a carrier cannot furnish cars to all it may refuse to furnish each shipper what it demands but in doing so it must treat them equally and impartially and without discrimination. The customary means of doing this in case of great car shortage or other trouble is of course an embargo.

A contract to maintain an embargo as against one consignee but not against others is a contract for a special service and one which is not provided for

in the demurrage tariff and which therefore cannot be legally made, and even though in form entered into is void and of no effect. The analogy between a contract to maintain an embargo and a contract to expedite the shipments of a certain shipper over the freight of other shippers is exact and such latter contract has been held bad because of the reasons stated.

Atchison etc. Co. v. Robinson, 233 U. S., 173.
Chicago & Alton R. Co. v. Kirby., 225 U. S., 155.

The Acts of Congress quoted *supra* cover car service and demurrage charges and place them on the same place as freight charges. They are controlled by tariffs lawfully published and filed and which cannot be departed from by either carrier or shipper.

St. Louis etc. R. Co. v. Edwards, 227 U. S., 265.
Hampton v. St. Louis etc. Co., ibid., 456.
Michie v. N. Y. etc. Co., 151 Fed., 694.

Similter, failure to collect demurrage charges or attempt by any device whatsoever to get the use of cars at less than the lawful rate amounts to accepting a rebate.

United States v. Philadelphia R. R. Co., 184 Fed., 543.
United States v. Bethlehem Steel Co. ibid., 546.
United States v. Lehigh R. Co. ibid., 546.

Each of the above affirmed in

188 Fed., 879.

To the same effect is the opinion of Lane, Commissioner, in

Blinn Lumber Co. v. Southern Pacific Co., 18 I. C. C. R., 430.

where he said:

> "Here, then, is statutory duty imposed upon the carrier to charge and upon the shipper to pay the rate fixed in the tariffs, and deviation from this rule subjects both the carrier and shipper both to fine and imprisonment. * * *"

The Acts are very broad, for it has been said:

> "The term device, as used in these statutes, includes any plan or provision whereby merchandise is transported for less than the published rate or any other advantage is given to or discrimination is practiced in favor of the shipper. * * *"
>
> *Armour Packing Co. v. United States*, 209 U. S., 56.

Not only cannot the shipper and carrier contract to embargo cars as against certain consignors or consignees, but even the Interstate Commerce Commission has no such power. It has been held:

> "It is not within the power of this Commission to order a carrier to interdict a particular shipper from engaging in interstate transportation."
>
> *Peale, Peacock & Kerr v. C. R. R. Co. of N. J.*, 18 I. C. C. R., 25, 34.

The misleading of plaintiff in error by temporary acquiescence of defendant in error in the placing of the embargo cannot operate to abrogate the tariff charges. The analogy between such conduct and erroneously misquoting rates in the bill of lading as less than the tariff rates, is clear. Such conduct has been held ineffective as defensive matter, and the duty exists upon the part of carrier to collect the published rate irrespective of that shown in the bill of lading.

Texas etc. Co. v. Mugg, 202 U. S., 242.

There is another valid reason why plaintiff in error cannot complain because the embargo was raised, and that is that on the uncontradicted testimony of its own officers, who made the arrangement, no agreement or understanding existed between plaintiff in error and defendant in error whereby defendant in error ever agreed to notify plaintiff in error when the embargo was to be raised. (Record p. 53.) Plaintiff in error made proper requests and exceptions on this issue (Requests 6 and 7, Record p. 54, and Exceptions 2 and 3 Record p. 62) but the referee did not think it necessary to decide this issue.

Properly because of the testimony being uncontradicted there was no necessity of a finding thereon. The Supreme Court of Wisconsin, however, did so find, saying in its opinion:

> "The alleged embargo was placed at request of appellant. There was no agreement that notice should be given of its removal and no duty rested upon the respondent to do so."

(Record p. 70.)

Furthermore, there was no question of the right of defendant in error to raise the embargo, for by the findings of the referee it was applied on March 14, 1908

> "at the request of the defendant *and not by reason of any conditions on its line necessitating such notice.*"

(Finding 17, Record p. 20.)

There is no evidence that the conditions had changed in June and where a situation is one shown to exist,

the presumption is that such situation continues unless evidence be introduced to the contrary.

Laughlin v. C. & N. W. R. Co., 28 Wis., 204.
Wallace v. Perales, 109 Wis., 316.
State ex rel. v. Chittenden, 112 Wis., 569.
Friend v. Yahr, 126 Wis., 291.

VI.

A COMMON CARRIER HAS A RIGHT TO PLACE AN EMBARGO WHEN NECESSARY TO FACILITATE ITS OPERATION AS A PUBLIC SERVICE CORPORATION BUT AN INDIVIDUAL CARRIER HAS NO RIGHT TO COMPEL THE ISSUANCE OF AN EMBARGO AS A SPECIAL FAVOR.

The distinction between an embargo *per se* and a *special contract to maintain an embargo* is clear and distinct and is sharply drawn by both the decision sought to be reviewed herein and authorities generally on the subject.

There appear to be but scant authority in the books as to the rights or duties of common carriers with respect to issuing so-called embargo or blockade orders. The following text-book definition is fairly accurate:

> "An embargo is an order issued by a carrier against connecting carrier or carriers refusing to accept any or a particular class of traffic to certain or all deliveries, rendered necessary by conditions beyond the carrier's control; due to congestion of traffic on carrier's lines, act of God, or other *vis major*."
>
> *Barnes on Interstate Transportation*, Section 356.

This definition, however, is not quite broad enough, for embargoes have been customarily issued against *certain commodities* as well as connecting carriers.

The law seems to be settled in some jurisdictions that a carrier has the right in its discretion to issue such orders and refuse temporarily to accept shipments for transportation when by reason of conditions upon its lines not happening through its fault, it is beyond its power to receive and transport commodities to certain stations or connecting carriers. The reason is that a common carrier is only bound to accept for transportation goods to the extent of its capacity, so that when goods are tendered it in excess thereof it has the right to refuse the same until it can properly receive, transport and care for them.

Penna. R. R. Co. v. Puritan Co., 237 U. S. 121.
Peet v. Railway Co., 20 Wis., 594.

This right of a carrier to embargo shipments when conditions warrant is clearly decided in

S. S. Daish & Sons v. Cleveland, etc. R. Co., 9 I C. R., 513.

where the right of the railroad company to embargo shipments to territory west of the bituminous coal region because of the miner's strike therein was upheld.

Great Western R. Co. v. Burns, 60 Ill., 284, 287.

holds that where a carrier cannot transport freight because of accumulation of cars on its rails, it may refuse to accept them if it notifies shippers of the condition on its road.

Bussey v. Memphis etc. R. Co., 13 Fed., 330.

holds that a railroad company may rightfully decline

to receive freight offered if it cannot transport the same because of conditions on its line.

In *Re Peterson*, 21 Fed., 885, 890, (E. D. Wis.), holds that in case of goods in possession of one carrier and the connection carrier issuing an embargo after the goods have been shipped, the first carrier is relieved from liability as a carrier if it notifies the shipper of the embargo.

> *Houston, etc. R. Co. v. Smith*, 63 Tex., 322, 22 A. & E. R. R., Case 421.

decides that a carrier can refuse to accept goods for shipment when

> "by unprecedented and unexpected press of business the company has already received more property than it can then transport and the warehouses at the point are full and the company has no present means of taking care of the property offered."

These authorities shown that the embargo right exists, and the last one makes it clear that the right being dependent on conditions on the carrier's lines must necessarily be left to the discretion of the carrier.

There is a limitation of the right to embargo as clearly defined as the right itself and that is that the carrier in placing and raising embargoes must act impartially and not use it as a means of discriminating against any consignor or consignee.

From the above it necessarily follows that no individual consignor or consignee can demand as a matter of right, or more particularly, make a special contract with a common carrier to place and maintain during a specified time an embargo as against himself, because

this amounts to a special service not specified in the tariff, and therefore a discrimination.

This doctrine has been clearly stated in a Texas case upholding the right of the carrier to refuse to accept goods because of unprecedented press of business, the court saying:

> "But the company will not be allowed to take advantage of such condition, so as to extend advantages to one customer to the injury of another. It must, under such circumstances, as at all other times in dealing with the public, act upon the rule of equality. To permit a company to take advantage of a press of business to deal out favors to certain customers to the detriment of others, might result in perpetuating that condition upon the line. * * * In this case it appears that while the company declined to take and transport the cotton of appellants as offered, during the same period it did take and transport for others cotton as it was tendered. * * * Such favoritism and discrimination is prohibited by the statute, * * * "
>
> *Houston, etc. R. Co. v. Smith*, 63 Tex., 322, 22 A. & E. R. R. Cas. 421, 425.
>
> *American T. & T. Co., v. Kansas C. S. R. Co.*, 175 Fed. 28, (C. C. A. 5th Circuit.)

The Interstate Commerce Commission has clearly distinguished between the carrier's right to embargo generally and the attempts by a shipper or carrier to use an embargo as a means of obtaining a discrimination. In

> *E. L. Rogers & Co., v. Philadelphia, etc., Co.*, 12 I. C. R., 309,

the carrier issued an embargo

> "on hay and straw consigned to or for the following parties at Twenty-third and Arch Street Station, viz.: E. H. Squires, E. L. Rogers and S. C. Woodman."

The Commission, speaking through Commissioner Lane, condemned this in no uncertain terms, saying:

> "That the embargo constituted an unlawful discrimination against complainant by defendant is apparent and undisputable. *Whatever may be said of an embargo against one commodity only in a time of congestion, nothing can be said for an embargo which refuses transportation facilities to some establishments while according such facilities to their competitors.* If the exercise of such a power were to be at all tolerated, carriers would be able to issue sentence of commercial death against some of their patrons, while continuing to serve others.
>
> There is no distinction in principle between a discrimination in the furnishing of facilities with which to originate a shipment, and such a discrimination as is here shown in the furnishing of facilities with which to receive a shipment." (Italics ours.)

If the carrier because of *vis major* and in order to clear its rails of a congestion, cannot interdict certain shippers, can the consignee, who has contracted to receive freight, and has no such excuse, rightfully demand that the carrier place an embargo against all shippers to said consignee? Can it go further and direct that the carrier furnish cars to some favored shippers and not to others? Such action is, we contend, clearly violative of both the spirit and letter of the Act to Regulate Commerce as hereinbefore quoted.

VII.

THE EMBARGO WAS PARTIAL ONLY.

Should the court hold that the decision of the state court to the effect that the contract to maintain the

embargo was valid and constituted a defense, the case below should be reversed only in part, for the reason that the embargo agreement did not apply to all the commodity shipped, only to a part thereof. This order is set out at length (Record p. 37) and the court will notice that it applies to bolts only. This is also covered by Finding 17, (Record p. 20).

The distinction between bolts and logs is clearly covered by the testimony of the traffic expert, Mr. Klapp, and the freight classification referred to by him which shows that they were differently classified and moved under different rates. (Record p. 45.)

VIII.

CONCLUSION.

For the reasons stated defendant in error respectfully submits that the writ of error should be dismissed or in the alternative that the judgment be affirmed.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1915.

No. 696

MENASHA PAPER COMPANY,
Plaintiff in Error.

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY,
Defendant in Error.

Suggestions in Opposition to Motion to Dismiss Writ of Error or to Affirm Judgment or to Transfer to the Summary Docket.

FELIX J. STREYCKMANS,
Attorney for Plaintiff in Error.

CHAMPLIN LAW PRINTING CO.

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The statement of facts set out by counsel on page 4 of their motion is substantially correct, with the following additions:

The record shows that during the year 1908, there was a heavy movement of forest products and the plaintiff in error was unable to receive and make use of the regular amount of bolts that were shipped to it. There was also quite a congestion in the yards of defendant in error at Neenah and Menasha. The result was that the so-called embargo was instituted by the defendant in error, as shown by finding No. 17 of the Referee, which is printed on page 15 of defendant in error's motion.

The defendant in error, on page 4, states that that some of the cars in question were taken to Snells, a siding some six to eight miles away, and they were spotted for unloading, as ordered by plaintiff in error. The record shows that the order referred to consisted of the plaintiff in error requesting the defendant in error from day to day to place cars on its side track.

The record shows that it was physically possible to place seven cars on the delivery track and that there never was placed during the period in question more than 3 or 4 empty or loaded cars on said track.

POINTS AND AUTHORITIES.

The rules relied upon by defendant in error do not authorize the imposition of car service charges under the finding of facts in this case.

United States v. *Denver & Rio Grande R. R. Co.*, 18 I. C. C. Rep. 7.

ARGUMENT.

It is not contended by plaintiff in error that this court can review the decision of the Supreme Court of the State of Wisconsin on a question of fact. It is claimed by us, however, that conceding that the findings of fact which were sustained by the Supreme Court of Wisconsin are correct, even in that case no car demurrage could be charged under the car service rules which were in effect at the time of the movement of the cars in question. We do not ask this court to determine the reasonableness of the rules in question, as we admit that such question is an administrative one which can only be determined by the Interstate Commerce Commission, but we contend that whether or not the car service has accrued, under the facts found by the Supreme Court of the State of Wisconsin, and under the rules then in force, is a question of law. Our contention, therefore, is that the state court erred in a conclusion of law and this is a matter which is properly reviewable by this Honorable Court. It will be noted that the car service rules relied upon by plaintiff in error provide, Rule 5, Sec. A:

> "When delivery cannot be made *on account of such track being fully occupied* or for any other reason beyond control of the carrier, *delivery* shall be made at the *nearest available point.*"

It is admitted that the track in question could hold seven cars and that at no time were there more than three cars on such track. We contend that

car service rules should be strictly construed and that under a proper legal construction of the car service rules there could be no other but *actual* occupation of the tracks in question. In other words, that "The Act to Regulate Commerce" and acts amendatory thereto, provide that no charge for car service can be made unless proper rules or tariffs are filed in accordance with the provisions of that act and that there were no such rules on file at the time the cars in question moved.

In *U. S.* v. *Denver & Rio Grande R. R. Co.*, 18 I. C. C. R., page 10, the Interstate Commerce Commission had a similar case before it and construed Section 1 of the Utah Demurrage rules, where we find the following language which is identical with that contained in Rule 5 of the Wisconsin Demurrage Bureau, which governs in the case at bar:

> "When such delivery cannot be made, on account of such tracks being fully occupied, or for any other reason beyond the control of the carrier, delivery shall be made at the nearest available point."

The opinion of the Interstate Commerce Commission we submit is absolutely in point. The Utah Car Service demurrage rules other than those quoted in the opinion of the Commission, as Exhibits 46 and 47, which were offered in evidence, are printed in the appendix hereto.

The question as to whether or not the facts in this case justify the imposition of car service charges under the rules in force at the time the cars moved, is, as we have heretofore stated, a question of law, and this question is one arising under a Federal

Statute, the Interstate Commerce Act, and was raised during the trial of the case in the State Courts, was decided against the right claimed by plaintiff in error, and is, therefore, not a question which is raised here for the first time. The review of this question is therefore within the jurisdiction of this court.

On pages 6 and 7 of counsel's motion certain propositions are submitted by counsel. We have heretofore shown that the question for determination by this court being one of law, was raised in the trial court, and is, therefore, not a new one here. Besides there is nothing in the printed motion, as it stands at the present time, to show the question is raised here for the first time. This disposes of point "a." The opinion of the State Supreme Court shows that it decided adversely to the contention of plaintiff in error, questions arising under *Federal Statutes, viz. Hepburn Act of June* 29, 1906, 34 Stats. 584c, 3591, and "The Act to Regulate Commerce."

As to point "b," what this Honorable Court decided in the case of *Missouri* v. *Andriano*, 138 U. S. 496, is that unless the decision of the State Court was against the *right* claimed by plaintiff in error under the Federal Statutes this court has no jurisdiction to review the question.

In the case at bar it was contended that under the Interstate Commerce Act, the plaintiff in error should not be compelled to pay car service charges on the cars in question. The State Court held against this contention and therefore this court has jurisdiction to review the question.

As to point "c," we submit that the authorities cited do not sustain the statement that "no question of construction of demurrage tariffs can be open in this court."

In *Pennsylvania R. R. Co.* v. *Puritan Mining Co.*, 237 U. S. 121, cited by counsel, this court held that "if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages occasioned by its violation or discriminatory enforcement, there is no administrative question involved," and either the State of Federal Courts have jurisdiction.

In other words, this court holds that administrative questions must first be passed upon by the Interstate Commerce Commission.

The question in the case at bar is not whether the rules are fair but whether under the rules as they stand, and the facts as found by the State Court, the demurrage was properly charged, as a question of law.

Furthermore it was held by the State Court that under the so-called Hepburn Act of June 20, 1906, 34 Stats. 584, C. 3591, the so-called embargo was illegal. This contention was decided adversely to plaintiff in error and this decision is therefore reviewable by this court.

In *Illinois C. R. Co.* v. *Mulberry H. C. Co.*, 238 U. S. 275, referring to *Pennsylvania, etc.* v. *Puritan Mining Co.*, 237 U. S. 121, this court says:

> "And because in that case the action was not based upon the ground that the carrier's rule of car distribution was unreasonable or discriminatory, but that plaintiff was damaged by

> reason of the carrier's failure to furnish it with cars to which it was entitled, even upon the basis of the carrier's own rule of distribution, it was held that the State Court had jurisdiction without previous application to the Interstate Commerce Commission."

So, in this case, even under the carrier's own car service rules and under the facts that were found by the State Court, we contend as a matter of law that the Carrier had no right to assess the car service in question.

The authorities cited by counsel under point "d" do not support their contention.

These authorities simply hold that this court "in an action at law, at least, has no jurisdiction to review the conclusion of the highest court of a state upon questions of fact." As we do not ask this court to do this, but for the sake of argument in this court, concede the findings of fact to be true. The cases therefore have no application.

The case of *Berwind-White Coal Mining Co.* v. *Chicago & Erie R. R. Co.*, 235 U. S. 371, 375, cited by counsel does not apply to the facts in the case at bar. The cars in that case were billed to Chicago for reconsignment beyond and the cars were held "convenient to the Belt Line on which cars could be transferred to a desired *new destination*, and the holding on such tracks of cars consigned as were those in question was in accordance with the practice which had existed for more than twenty years."

The cars in question in the case at bar were not shipped to Menasha for reconsignment beyond, but

under the car service rules then in force were to be placed on the side track of defendant as soon as the routine of the yard work would permit, unless the side track was fully occupied, when delivery was to be made at the nearest available point. Furthermore the cars were *not* held at Snell's Siding in accordance with a practice which had at any time theretofore existed.

The case of *Chicago, etc.* v. *Hardwick*, 226 U. S. 426, simply holds that a state has no power to pass laws governing the delivery of cars to shippers for Interstate transportation, because that subject is fully covered by Federal Statute.

No authority has been cited either by counsel or by the Supreme Court of Wisconsin holding that a receiver of freight may not inform a railroad that he will not receive any cars in the future. This is not technically an embargo, but we contend is the positive right of a person, firm or corporation in the United States to refuse to accept freight that may be consigned to it. This was all that was done in the case at bar. The plaintiff in error notified the defendant in error that it would not receive any cars of bolts consigned to it and this notification was respected for some time, but on the carrier's own motion was subsequently violated with the result that plaintiff in error had a large number of cars forced on it as indicated in the Referee's finding No. 17, heretofore referred to.

This raises the following questions of law which were submitted to the state courts, decided against the contention of plaintiff in error and which we are asking this court to review:

1st. When car service rules or tariffs are filed and published by a carrier in accordance with the Interstate Commerce Act, which provide for holding cars at the nearest available point short of destination *only when the delivery track is fully occupied*, can the carrier assess such charges when the track is not fully occupied on the ground that the receiver of the cars might not have been able to unload the cars had they been placed on the delivery track to its full physical capacity?

We submit this is a question of law and if granted a hearing on this question we expect to show that car service rules must be strictly construed in favor of the shipper, and to construe the rules as was done by the state court would permit of discrimination and rebates in freight charges which are prohibited by the Interstate Commerce Act.

2nd. Can a person refuse to accept any interstate shipments of carload freight and so notify a common carrier, or is such person compelled to receive freight that is destined to it, whether or not it desires to receive the same?

If a carrier accepts a notification from a person that he will not receive freight of a certain kind from any shipper, and the carrier acts on such notification for a certain length of time, can such carrier, without notice, accept from consignees a large number of cars and transport them to such person in such large numbers that such person is unable to unload within the free time provided by car service rules, and thus by violating its agreement and notice, compel the payment of large amounts of car service charges?

It will be noted that the Supreme Court of Wisconsin says in its opinion "The rules in force at the time in question clearly cover the instant case and justify the demurrage charges on any theory of the case."

Whether the rules cover the facts found in the instant case is a question of law which we are eager to have this court review. To argue this question here would be to go into the merits of the case, which we understand we are precluded from doing on this motion.

We agree with counsel that "the case is of such a character as not to justify extended argument" and that the same can be disposed of on the summary docket.

We submit the motion to dismiss the writ of error, and to affirm the judgment of the Supreme Court of Wisconsin should be denied.

FELIX J. STREYCKMANS,
of Chicago, Illinois,
Attorney of Record for
Plaintiff in Error.

APPENDIX.

Exhibits No. 46 and 47, being certified copy of Utah Car Service Rules, certified to by the Interstate Commerce Commission, as follows:

"Rule 4. Car Service Charges.

"At the expiration of the free time a charge of One Dollar ($1) per car per day, or fraction thereof, must be collected for detention to all cars held for loading or unloading, or *subject to order of consignors, consignees or their agents.* (See Special Rules applicable to Tonopah & Goldfield Railroad.)

"Rule 8. Cars Detained for Various Causes.

"Section 1. Cars detained at any point within the territory of this Association by reason of being billed to order and awatiing bills of lading or instructions, as to disposition and cars detained for want of proper shipping instructions, *or for any cause for which shipper or consignee and not the Railroad Company is responsible, shall be subject* to charges under these rules.

"Sec. 2. When there is a dispute in regard to freight charges, and cars are held or refused on that account, or where car is reweighed at shipper's or consignee's request, regular Car Service charges must be assessed and collected, provided that no correction in freight charges or weight is made.

"Sec. 3. Cars detained by reason of being improperly or insecurely loaded shall be subject to Car Service charges under these rules.

"Sec. 4. When cars are detained at shipping point by shipper or consignee or stopped in transit for them or ordered from one destination to another, and Car Service charges cannot otherwise be collected before forwarding, agents must enter amounts upon bills of lading and way-bills as advance charges."

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 696.

MENASHA PAPER COMPANY, PLAINTIFF IN ERROR,

v.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, DEFENDANT IN ERROR.

MOTION TO DISMISS WRIT OF ERROR OR TO AFFIRM JUDGMENT OR TO TRANSFER TO THE SUMMARY DOCKET.

GEO. LINES,
WILLET M. SPOONER,
LOUIS QUARLES,
Attorneys for Defendant in Error.

Subject Index.

Index of Cases.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 696.

MENASHA PAPER COMPANY, PLAINTIFF IN ERROR,

v.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF WISCONSIN.

MOTION TO DISMISS WRIT OF ERROR OR TO AFFIRM JUDGMENT OR TO TRANSFER TO THE SUMMARY DOCKET.

Now comes the defendant in error, Chicago & North Western Railway Company, by its attorneys of record herein, and moves this honorable court:

First. To dismiss the writ of error herein on the ground that this court has not jurisdiction thereof, no Federal question being involved therein.

Second. To affirm the judgment of the Supreme Court of the State of Wisconsin on the ground that it is

manifest that this writ of error was taken for delay only, and that the questions upon which the decision in this cause depend are so frivolous as not to need further argument, having been repeatedly decided by this court contrary to the contentions of plaintiff in error, and involving going behind findings of fact approved by two state courts.

Third. To transfer this cause for hearing to the summary docket, if this court should decline to dismiss or to affirm, because the case is of such a character as not to justify extended argument.

GEO. LINES,
WILLET M. SPOONER,
LOUIS QUARLES,
Of Milwaukee, Wisconsin,
Attorneys of Record for Defendant in Error.

NOTICE OF MOTION.

The plaintiff in error is hereby notified that the defendant in error will on the 10th day of January, A. D. 1916, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as a hearing may be had, submit for the consideration of the said court the foregoing motions, and each of them, and the brief in support thereof, hereto attached, including portions of the record as contained in an appendix thereto, all of which are now served upon you herewith.

GEO. LINES,
WILLET M. SPOONER,
LOUIS QUARLES,
Of Milwaukee, Wisconsin,
Attorneys of Record for Defendant in Error.

Copy of foregoing motion and notice, together with statement of facts, points and authorities, argument and appendix, received this Seventeenth day of December, 1915.

WILLIAM L. REED,
FELIX J. STREYCKMANS,
Of Chicago, Illinois,
Attorney of Record for Plaintiff in Error.

II.

STATEMENT OF FACTS.

This was an action by defendant in error as plaintiff against plaintiff in error to recover demurrage charges assessed on cars consigned to it at Menasha, Wisconsin, and delivered to it by defendant in error as a common carrier. There were two causes of action, the first for intrastate commerce and the second for interstate commerce, and defendant in error recovered for the entire amount of demurrage claimed. The demurrage recovered in the second cause of action was under tariffs lawfully on file with the Interstate Commerce Commission. The case was referred by the Circuit Court of Winnebago County to a Master to try, hear, and determine, and the Master made findings of fact and conclusions of law which were affirmed by both the Circuit Court and the Supreme Court of Wisconsin.

The cars in suit were consigned to plaintiff in error at its plant in Menasha, Wisconsin, and contained logs and bolts. Owing to the crowded condition of its piling ground plaintiff in error had no room on which to unload and store the freight on these cars and so was unloading them direct to the saw. The saw was located in the center of its private track and in order to unload as indicated it was impossible for defendant in error to spot more than three to four cars upon the siding, although it had a capacity of seven cars. As the cars arrived at Menasha plaintiff in error was notified thereof, some of the cars were kept in the yards at Menasha and some were taken down to Snells, a siding six to eight miles away, and they were spotted for unloading as ordered by plaintiff in error. Demurrage

was computed from the giving of the notice of arrival and not from the spotting on the private track, none or but very little demurrage accruing after the cars were spotted. The demurrage was claimed as properly assessed under Rules 1, 3 and 5 of the Tariff and the courts so found.

Plaintiff in error, to stop the accumulation of cars, requested defendant in error to place an embargo or blockade order against cars consigned to it and to raise it from time to time as requested and it at first agreed so to do. Defendant in error did not continue the embargo in force, as it deemed such an arrangement illegal where done for the sole benefit of one consignee. The Supreme Court of Wisconsin held that a contract to maintain such an embargo was void because inhibited as a discrimination by the Act to Regulate Commerce of June 26, 1906, and afforded no defense to plaintiff in error.

III.

POINTS AND AUTHORITIES.

(a) A federal question cannot be raised for the first time in the petition for a writ of error from this court and the accompanying assignment of errors.

Haire *v.* Rice, 204 U. S. 291-301.

(b) No federal question is presented under the assignment of errors as the decision of the highest court of the state is in favor of the federal statute and authority, and hence the errors assigned are not within Section 237 of The Judicial Code. Neither does the amendment thereof by the Act of December 23, 1914, affect the question, as there is no attempt on the part of plaintiff in error to review this question by certiorari as therein provided.

Missouri *v.* Andriano, 138 U. S. 496.

(c) No question of construction of demurrage tariffs is or can be open in this court but merely the question of discrimination in the actual enforcement thereof by the carrier; and no such question is raised on the assignments of error.

Pennsylvania R. R. Co. *v.* Puritan Coal Mining Co., 237 U. S. 121.

Illinois C. R. Co. *v.* Mulberry H. C. Co., 238 U. S. 275.

(d) The question of whether or not the demurrage was assessed at destination is a question of fact, and this court has no jurisdiction to go behind the findings of fact approved by the State Supreme Court.

Clipper Mining Co. *v.* Eli Mining & Land Co., 194 U. S. 220.

Dower *v.* Richards, 151 U. S. 658-672.

(e) That demurrage under facts similar to those in the case at bar was, in fact, assessed at destination under the Act to Regulate Commerce, has been determined contrary to contentions of plaintiff in error, and has been held as so frivolous as not to support a writ of error.

Berwind-White Coal Mining Co. *v.* Chicago & Erie R. R. Co., 235 U. S. 371, 377.

(f) An agreement not to furnish cars to a particular shipper in interstate commerce is void.

Chicago, etc., Co. *v.* Hardwick, etc., Co., 226 U. S. 426.

IV.

ARGUMENT.

The first two assignments of error are directed to the proposition that the tariffs lawfully on file with the Interstate Commerce Commission do not authorize the assessing and collection of demurrage under the facts appearing in the record herein. The tariff being on file pursuant to the terms of the Act to Regulate Commerce may possibly present a federal question, but the state court held that the tariff provided for demurrage in the instant case, and its decision is therefore in favor of the act, not against it.

The reasons urged below as to why the tariffs did not authorize the recovery were (a) consignee's track must be kept full by the carrier or demurrage cannot be collected; and (b) demurrage can be charged at destination only. As to the first question, that is foreclosed by the findings of fact numbered 5 (*infra* p. 13) to the effect "that as defendant used the side-track, more cars could not have been placed upon it and unloaded than were actually placed upon it and unloaded there during the times in question." The second question is also foreclosed by finding 14 (*infra* p. 14); "That the demurrage sued for accrued at destination," as well as by the decision of this court that Hammond, Indiana, is to be considered destination of cars consigned to Chicago although it is twenty miles away, whereas the cars in dispute herein were all held within eight miles of the siding of plaintiff in error.

Berwind White Coal Mining Co. *v.* Chicago & Erie R. R. Co., 235 U. S. 371-375.

The third assignment of error is predicated upon the refusal of the carrier, defendant in error, to keep in force an embargo order against plaintiff in error unless and until the latter raised it from time to time. The Supreme Court of Wisconsin held, not that an embargo *per se* was illegal, but that a *contract* to place, maintain, and raise it at the request and dictate of a single consignee was illegal as constituting a discrimination violative of the Hepburn Act. This error is not available here (a) because the state court's decision was in favor of the federal statute; and (b) because of the finding No. 17 (*infra* p. 15) that the embargo was placed solely at the request of defendant, clearly brings the case within the authority of—

Chicago, etc., Co. *v.* Hardwick, etc., Co., 226 U. S. 426.

V.

APPENDIX.

Pursuant to the rules and practices of this honorable court, and for the purposes of these motions only, defendant in error has caused to be printed the assignment of errors to this honorable court, findings of fact of the referee, the demurrage tariffs under which the shipments in question moved, the judgment of the Circuit Court, and the opinion of the Supreme Court of Wisconsin.

ASSIGNMENT OF ERRORS.

Now comes the above defendant and files herewith its petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignment:

1. The Supreme Court of Wisconsin erred in holding and deciding that there were any demurrage charges due for the reason that under the provisions of the Act of Congress commonly called the "Act to Regulate Commerce," and amendments thereto, no such demurrage charges can be charged and collected unless tariffs on file with the Interstate Commerce Commission provide for such charges.

2. The tariffs filed for complainant with the Interstate Commerce Commission at the time of the shipments in question moved did not authorize the charging and collection of demurrage charges on the cars named in the complaint.

3. The Supreme Court of Wisconsin erred in holding and deciding that the so-called embargo was in violation

of the so-called Hepburn Act of June 29, 1906, 34 Stats. 584, C. 3591.

For which errors, the defendant, Menasha Paper Company, prays that the judgment of the said Supreme Court of Wisconsin, dated May 22, 1914, be reversed, and a judgment entered for the defendant, Menasha Paper Company, and for costs.

FELIX J. STREYCKMANS,
Attorney for Menasha Paper Company.

FINDINGS OF REFEREE.

(Title of Cause.)

This action was referred to the undersigned as Referee by order of this Court, dated May 2, 1912, to hear, try and determine the whole issues in this cause.

I, John F. Harper, Referee so appointed, do respectfully report that after issuing and serving notice of hearing, the parties to said matter appeared at my office in the City of Milwaukee, on the 2nd day of September, 1913, and the proceedings then and thereafter had in this matter are set forth in the record of such proceedings, filed herewith.

Upon the testimony taken and other proceedings had, and after hearing arguments of counsel, I respectfully report the following findings of fact and conclusions of law:

FINDINGS OF FACT.

1. That the plaintiff was, at all times mentioned in the complaint, a railroad corporation, engaged in operating a railroad at Menasha, Wisconsin, and elsewhere, and that the defendant was, at such times, also a corporation engaged in business at Menasha, Wisconsin, and having its place of business adjoining the railroad of the plaintiff.

2. That the defendant, during the times in question, maintained and operated for the purposes of unloading the cars delivered by the plaintiff, a private sidetrack, which connected with the tracks of the plaintiff.

3. That on and between the 3rd day of June, 1908, and the 20th day of July, 1908, the plaintiff carried and delivered in intrastate commerce cer-

tain cars, containing pulp and wooden bolts and logs, as more particularly set forth in Exhibit B, attached to the complaint; that the numbers of said cars, the dates and hours of their arrivals at Menasha, Wisconsin, the dates and hours when the same were ordered by the defendant placed upon its side-track, the dates and hours when they were respectively placed upon its side-track for unloading, and the dates and hours when they were respectively released, are all correctly set forth in Exhibit B, attached to the complaint.

4. That on and between the 6th day of June and the 24th day of June, 1912, the plaintiff carried and delivered in interstate commerce certain cars, containing logs and wooden bolts, as more particularly set forth in Exhibit C, attached to the complaint; that the numbers of said cars, the dates and hours of their arrivals at Menasha, Wisconsin, the dates and hours when the same were ordered by the defendant placed upon its side-track, the dates and hours when they were respectively placed upon its side-track for unloading, and the dates and hours when they were respectively released, are all correctly set forth in Exhibit C, attached to the complaint.

5. That the defendant's side-track, from which the cars were unloaded by the defendant, could accommodate about seven cars, but had an actual capacity, as used during the times in question, of three or four cars, or possibly five; that as defendant used the side-track, more cars could not have been placed upon it and unloaded than were actually placed upon it and unloaded there during the times in question, to-wit: about two or three cars a day.

6. That each and every of the cars in question was held at destination on account of congestion of defendant's private side-track, due to its inability to unload and awaiting orders from defendant.

7. That when each of the cars in question ar-

rived, the plaintiff notified the defendant of each arrival by telephone, giving the car numbers, and, according to the general custom, with only occasional exceptions, the plaintiff held the cars until defendant notified it to place them upon the side-track for unloading.

8. That defendant did not order the cars placed for unloading sooner than as shown in Exhibits B and C, attached to the complaint, because, practically, defendant could not handle any more cars than it did, and hence did not ask for them.

9. That no request or demand was ever made by order to spot cars or otherwise that plaintiff spot cars for unloading on any public delivery track or any place other than defendant's said private side-track, and that defendant would have been at all times unable to unload said cars had they been so spotted.

10. That there was no delay on the part of the plaintiff in switching the cars upon the side-track, or refusal or inability of the plaintiff to place the cars, nor any insufficiency of terminal facilities, nor any congestion in the yards of the plaintiff which prevented the placing of cars upon the side-track in question, when ordered.

11. That the charges for demurrage in question should be computed according to the rules of the Wisconsin Car Service Association, shown as Exhibit A in plaintiff's complaint.

12. That the schedules attached to the complaint, Exhibit A, were tariffs for computing demurrage charges, duly prepared, printed, posted and filed with the Railroad Commission of Wisconsin and the Interstate Commerce Commission.

13. That none of the cars on which demurrage accrued were through consignments not held for orders.

14. That the demurrage sued for accrued at destination.

15. That there is due to the plaintiff from the

defendant for demurrage upon the cars mentioned in Exhibit B attached to the complaint, the amounts therein set forth, aggregating $104.00, from which there should be allowed deductions, as set forth in said Exhibit B, computed according to the Car Service Rules, amounting to $70.00, leaving a net balance of $34.00 to the plaintiff under Exhibit B.

16. That there is due to the plaintiff from the defendant, for demurrage upon the cars mentioned in Exhibit C attached to the complaint, the amounts therein set forth, aggregating $1,419.00, from which there should be allowed deductions, as set forth in said Exhibit C, computed according to the Car Service Rules, amounting to $435.00, leaving a net balance of $984.00 to the plaintiff under Exhibit C.

17. That on March 14th, 1908, the plaintiff, at the request of the defendant, and not by reason of any conditions on its line necessitating such notice, notified the plaintiff's agents in Wisconsin and Michigan, "until further advised," to discontinue to furnish equipment to load with bolts for the defendant; that this arrangement, called an "embargo," did not run out until the close of the year 1908; that this "embargo" did not by its terms cover logs and was not thereafter modified by an agreement of the parties to cover logs; that in April and May, 1908, the said limited number of cars from certain shippers were forwarded by the plaintiff to the defendant upon defendant's request, but that such cars were not included among those set forth in Exhibits B and C, attached to the complaint; that after shipment of these cars, the "embargo" was applied again, so that it was the agreement between the plaintiff and the defendant not to ship any bolts to plaintiff, but this agreement was violated, and the cars mentioned in Exhibts B and C were shipped in violation thereof, and were shipped without notice from the plaintiff to the

defendant of intention to ship the same, resulting in the arrival of cars in great numbers on certain days, as more particularly set forth in the exhibits attached to the complaint, and as a result of the violation of the embargo agreement as to bolts, hereinbefore found.

18. That in July 20, 1908, and again in September, 1911, plaintiff duly demanded of defendant payment of the demurrage set forth in the complaint; that defendant refused and assigned as its sole ground for refusing to pay, the existence of the said embargo order.

CONCLUSIONS OF LAW.

1. That plaintiff is entitled to recover of the defendant the sum of $34.00 for the demurrage set forth in Exhibit B, attached to its complaint, and the further sum of $984.00 for the demurrage set forth in Exhibit C, attached to its complaint, making in all a total of $1,018.00, together with interest thereon from July 20th, 1908.

2. That defendant is estopped from urging any defense other than the existence of the said embargo.

3. That the embargo arrangement found in Finding 17, was and is illegal, contrary to public policy, and void.

Dated March 13th, 1914.

Respectfully submitted,

JOHN F. HARPER,

Referee.

DEMURRAGE TARIFF.

EXHIBIT A.

WISCONSIN CAR SERVICE ASSOCIATION.

RULES AND INSTRUCTIONS TO AGENTS.

RULE 1.

CARS SUBJECT TO RULES.

All carload freight, all freight taking carload rate, and all freight in cars, whether full carload or not, taking track delivery, will be subject to Car Service and Trackage Rules.

EXCEPTIONS: Cars loaded with live stock, through consignments when not held for orders, private cars detained on the tracks of the owner of such cars, and Company material are not subject to Car Service Rules and shall not be included in reports to the Manager.

RULE 2.

FREE TIME ALLOWED.

SECTION A. On all commodities for loading or unloading forty-eight (48) hours (two (2) days), free time will be allowed.

SECTION B. When same car is reloaded ninety-six (96) consecutive hours, four (4) consecutive days will be allowed for unloading and reloading.

SECTION C. On all grain subject to State or Board of Trade Inspection, received on or before 8 A. M., disposition shall be given by 6 P. M. of same day, provided inspection has been made.

SECTION D. Small railroads (belt, electric, tram, logging, etc.), not members of the Car Service Association, handling cars for themselves, or other parties, shall be charged with all cars delivered

them from the time placed upon interchange track until returned thereto, a reasonable time being allowed to perform the switching service in addition to forty-eight (48) hours for loading and unloading.

NOTE.—In calculating time, Sundays and Legal Holidays are excepted.

RULE 3.

COMPUTING TIME.

SECTION A. On cars for loading or unloading the free time shall be computed from the first 7:00 o'clock A. M. or 12:00 o'clock noon following the notice of arrival or after placing.

SECTION B. Notification of arrival of freight shall be served immediately upon arrival by personal act, or deposited in the United States post-office, or other means mutually agreed upon between agents and consignees. If by mail, notice shall date from time of deposit in the United States mail.

RULE 4.

CARS HELD FOR VARIOUS PURPOSES.

Cars which are stopped in transit or held by orders of shippers or consignees for reconsignment to points beyond, for change of load, for amended instructions, for change in billing, milling, shelling, cleaning, etc., or on account of improper, unsafe or excessive loading, or for any other reason for which the shipper or consignee is responsible, shall be subject to Car Service charges after the expiration of forty-eight (48) hours from arrival at the point of stoppage, and all Car Service must be collected, or billed as advances when cars go forward.

RULE 5.

Placing Cars for Delivery and for Loading.

Section A. Cars containing freight to be delivered on carload delivery track or private sidings shall be placed on the track designated as soon as the ordinary routine of yard work will permit. When delivery cannot be made on account of such track being fully occupied, or for any other reason beyond control of the carrier, delivery shall be made at the nearest available point.

Section B. Cars for unloading shall be considered placed when such cars are held awaiting orders from consignors or consignees, or for the payment of freight charges after the notice mailed or otherwise given, or for the surrender of bills of lading.

Section C. The delivery of cars to private tracks shall be considered to have been made, either when such cars have been placed on the tracks designated, or, if such track or tracks be full, when the road offering the cars would have made delivery had the condition of such tracks permitted.

Section D. On private cars detained on the tracks of the Railroad Company, or on private tracks of firms other than the owner of the car, the regular charge will be made.

Section E. Cars must not be held back from nor out of the place to which they are consigned for the purpose of evading Car Service and Trackage charges. When cars are held by reason of consignee not being ready to receive them, the agent shall include such cars in his reports to the Manager, and Car Service and Trackage will be charged for as provided in these rules.

Section F. Cars for loading shall be considered placed when such cars are placed on shipper's orders or when held upon orders of shippers.

RULE 6.

Freight in Bond.

On cars containing freight in bond, when placed for unloading, Car Service and Trackage will commence forty-eight (48) hours after cars have been released by United States Customs Inspector, providing consignee or consignor gives immediate notime to the proper Customs Inspector. When such notice is not given at once, the delay between the arrival and time of such notice will be added to the time consumed in the unloading, and the regular charge applied.

RULE 7.

Inability to Receive Cars.

When any consignee is unable to receive cars, and for that reason delivering line refuses them from connecting line for switching, when consigned to such consignee, the agent of such connecting line or lines holding cars for such consignee shall immediately notify the consignor or consignee in writing of cars so held and of the inability to forward or deliver the same, and shall charge Car Service and Trackage after forty-eight (48) hours from such notice. Copy of such notice must be sent to the Manager.

RULE 8.

Charges.

At the expiration of the free time allowed, if cars are not loaded or unloaded, a minimum charge of One Dollar ($1.00) per car per day or fraction of a day shall be made.

RULE 9.

COLLECTIONS.

SECTION A. It is the duty of the agent to demand Car Service and Trackage on all cars before delivering them when same has accrued between the arrival and ordering. It is also the duty of the agent, where he has any doubt about Car Service and Trackage being paid, to demand Car Service and Trackage daily after the free time allowed for loading and unloading cars; if payment of said Car Service is refused, to decline to deliver the car or to allow the lading to be taken from it, either by sealing the car, locking the car, or by placing it where it is not accessible to consignee or consignor; or, at his option, may send such freight to a public warehouse where same will be held subject to Car Service and Trackage charges accrued, in addition to all other charges.

SECTION B. When cars are detained on private or specially designated tracks for loading or unloading beyond time allowed in accordance with the rules, and payment of Car Service charges is refused or unnecessarily deferred, Agents will, upon advice to that effect from the Manager, after giving five days' notice, decline to switch cars to private or specially designated tracks for such parties, and thereafter tender freight from public team tracks and collect all charges before delivery, or until satisfactory guarantee is given that Car Service rules will be complied with.

SECTION C. When freight is detained at shipping point by shipper or consignee, or stopped in transit for them, or ordered from one destination to another, and Car Service and Trackage charges cannot otherwise be collected before forwarding, Agents must enter amounts on bills of lading or shipping receipts and way-bills as advanced charges.

SECTION D. Agents will collect Car Service

charges regardless of the state of weather, unless exemption is authorized by the Manager.

SECTION E. When freight is transferred, Car Service and Trackage charges will continue on the car or cars into which transfer is made.

SECTION F. Car Service charges due upon cars ordered to tracks of connecting lines within switching limits will be collected by the agent of the forwarding road. When ordered or destined to points beyond switching limit, the charges will follow as advances unless paid by shipper or consignee.

SECTION G. Where a car is detained on one road awaiting orders from consignee or consignor, and subsequently ordered to connecting line for delivery within switching limits, the transfer slip or shipping order will accompany the car and show the number of hours such car has been detained awaiting orders.

For each day or fraction of a day a car is detained over forty-eight (48) hours, the receiving Agent will collect One Dollar ($1.00) and deduct twenty-four (24) hours for each dollar collected from the total time car is detained, showing the remainder of hours detained on the transfer slip.

The delivering agent will allow forty-eight (48) hours free time, less the number of hours shown on transfer slip.

RULE 10.

AUTHORITY.

Agents shall report to and receive instructions from the Manager in all matters pertaining to the enforcement of Car Service and Trackage Rules.

RULE 11.

CLAIMS.

All claims arising from operation hereunder must be presented to the Manager with the paid Car Service expense bills and a written statement clearly giving their reasons for such claims.

RULE 12.

COMPLAINTS.

All doubtful questions as to the meaning and application of these rules shall be referred to the Manager for his decision.

JAS. O. KLAPP, Manager.

JUDGMENT OF CIRCUIT COURT.

(Title of Cause.)

The above entitled action having been at issue and having been duly referred to Hon. John F. Harper, Esq., as referee, to try, hear and determine, and the said action having been duly tried before the said referee, and he having duly made his report thereof, including findings of fact and conclusions of law, and the same having been duly confirmed by the court;

NOW THEREFORE, On motion of Lines, Spooner, Ellis & Quarles, attorneys for plaintiff,

IT IS ORDERED AND ADJUDGED, By the Court, that the said report of the said John F. Harper, referee, be and the same hereby is confirmed.

IT IS FURTHER ORDERED AND ADJUDGED, That the plaintiff do have and recover of the defendant the sum of Thirteen Hundred and Seventy-four and 63/100 Dollars damages, and Forty-nine 60/100 Dollars costs, being in all the sum of Fourteen Hundred Twenty-four and 23/100 ($1,424.23) Dollars.

Dated this 22d day of May, 1914.

By the Court,

JOHN H. LAABS,

Clerk.

OPINION.

State of Wisconsin—In Supreme Court—August Term, 1914, No. 123.

(Title of Cause.)

This action was brought to recover for alleged demurrage charges on cars of logs and bolts shipped to appellant at Menasha, Wisconsin, in June and July, 1908. Two causes of action are set out in the complaint; the first for demurrage accruing on intrastate shipments, and the second for demurrage accruing on interstate shipments. The case was referred to John F. Harper, Esq., referee, to hear, try and determine, who made the following Findings of Fact and Conclusions of Law:

[*These are printed in full herein, supra, page 12.*]

KERWIN, J.—The findings of the learned referee, confirmed by the court and sustained by the evidence, support the judgment. The appellant contends that Section C, Rule 5, hereafter quoted is controlling. Under this rule it is insisted that it was the duty of respondent to keep the track of appellant full and that it would accommodate seven cars, and that only three or four and never to exceed five cars were kept thereon, hence no demurrage could have been charged under the rule referred to. We are of opinion that the referee properly construed the rule as applied to the facts in this case in holding that the track was full to its capacity when demurrage was charged. The rule must have a reasonable construction; and it appears from the evidence that while seven cars could be placed upon the track at one time, not to exceed five could be placed there so as to make its use for unloading practicable, and this situation was well understood by the parties and cars placed as re-

quired accordingly. So it is clear that the track was kept full within the meaning of the rule.

In the instant case the cars held and upon which demurrage was charged reached destination at Menasha and were held at Snells siding for convenience awaiting order, and the appellant ordered only so many cars as it could unload from day to day. It appears that the appellant did not order any more cars placed on its track than were placed thereon, but it is claimed that it was the duty of respondent to place and keep the track full with seven cars whether such condition interfered with unloading or not, and if the track was not kept full no demurrage could be charged.

The construction placed upon the rule by both parties, viz: that the track was full when the number of cars which could be handled there were upon it was the sensible and practical construction. The respondent was not obliged to do a vain and useless thing by putting seven cars upon the track at one time and thus prevent the practical handling or unloading of any cars thereon by appellant contrary to its orders. The referee and court below found upon sufficient evidence that while the appellant's side track from which cars were unloaded could accommodate about seven cars it had an actual capacity, as used during the time in question, of only three or four cars, or possibly five; that as defendant used the side track more cars could not have been placed upon it and unloaded than were actually placed upon it and unloaded during the time in question, to-wit: about two or three cars a day.

Appellant complains of a so-called raising of an alleged embargo without notice. The court below and the referee held the embargo illegal against public policy and void. It appears from the evidence that appellant demanded of respondent that it issue an embargo refusing to give to shippers

cars for bolts consigned to appellant at Menasha and respondent did so. The order reads as follows: "On account of accumulation, you will, until further advised, discontinue to furnish equipment to load with bolts consigned to Menasha Paper Company. Please be governed accordingly." It is clear that the so-called embargo as laid and operated by direction of appellant granted special privileges and was contrary to law, therefore raised by the respondent so as to avoid liability for discrimination as between shippers. Both the federal law and the state statutes provide against discrimination or special privileges; and the so-called embargo in question was in contravention of law.

Chicago & A. R. Co. vs. Kirby, 225 U. S. 155.

St. Louis I. M. & S. R. Co. vs. Edwards, 227 U. S. 265.

Michie vs. New York, N. H. & H. R. Co., 151 Fed. 694.

United States vs. Philadelphia R. R. Co., 184 Fed. 543.

Blinn Lumber Co. vs. Southern Pacific R. Co., 18 I. C. C. R. 430.

Armour P. Co. vs. United States, 209 U. S. 56.

Chicago R. I. & P. Co. vs. Hardwick F. E. Co., 226 U. S. 426.

Hepburn Act of June 29, 1906, 34 Stats. 584 c. 3591; *Sections* 1794-4, 1797-10, 1797-22, 1797-24 *Wisconsin Stats.*

It is claimed by appellant that because some of the cars after reaching destination at Menasha were carried beyond to the nearest side track and there held until the accumulation in the yard ceased, then moved back to Menasha, the cars were not held at destination, hence no demurrage could be charged, and rests on *United States vs. Denver & R. G. R. R. Co.*, 18 I. C. C. R. 7, in support of

this position. That case is not controlling here. An examination of it will show that the commission in treating the case found no rule similar to rules of the respondent which control the instant case, copies of which are attached to the complaint, and the case relied upon by appellant is based upon a rule in force at the time the demurrage accrued, therefore governed the case. But afterwards provision was made for a case similar to the one before the commission and which was in force when the case above referred to was tried, but not appliable because the demurrage accrued before such rule went into effect. In referring to this subject in *United States vs. Denver & R. G. R. R. Co., supra*, the commission said, p. 10 of 18 I. C. C. R.:

> "If the provisions subsequently inserted and now appearing in defendant's tariff had been in force at the time, demurrage would have accrued on cars held at Thistle Junction by direction of complaint. We rest our decision of this case on the proposition that demurrage can be assessed only in accordance with tariff provisions, and that the Rules of the Utah Car Service Association in effect when these cars were delivered did not authorize the demurrage charges in question."

In the case at bar the cars reached destination and notice of their arrival was given by respondent and the cars were thereafter held awaiting orders. The rules in force at the time in question clearly cover the instant case and justify the demurrage charges on any theory of the case.

"Rule 4. Cars which are stopped in transit or held by orders of shippers or consignee for re-consignment to points beyond, for change of load, for amended instructions, for change in billing, milling, shelling, cleaning, etc., or on account of improper, unsafe or excessive loading, or for any other reason for which the shipper or consignee is respon-

sible, shall be subject to Car Service charges after the expiration of forty-eight (48) hours from arrival at the point of stoppage, and all Car Service must be collected, or billed as advances when cars go forward."

"Rule 5. * * * * * * *

"Section B. Cars for unloading shall be considered placed when such cars are held awaiting orders from consignors or consignees, or for the payment of freight charges after the notice mailed or otherwise given, or for the surrender of bills of lading.

"Section C. The delivery of cars to private tracks shall be considered to have been made, either when such cars have been placed on the tracks designated, or, if such track or tracks be full, when the road offering the cars would have made delivery had the condition of such tracks permitted."

Complaint is made by appellant that the so-called embargo was raised without notice to it, and that such raising caused the bunching of cars and the delay in unloading. The alleged embargo was placed at the request of the appellant. There was no agreement that notice should be given of its removal and no duty rested upon the respondent to do so.

By the Court: The judgment is affirmed.